Report
of the

SELECT COMMITTEE - BILL NO. 99

An Act to Amend and Revise the Law Respecting Workers' Compensation

House of Assembly
Nova Scotia

February 1, 1991

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REPORT TO THE HOUSE OF ASSEMBLY OF THE SELECT COMMITTEE ON WORKERS COMPENSATION

THE SELECT COMMITTEE

A Select Committee on Workers Compensation was established during the 2nd session of the 55th General Assembly of the Nova Scotia House of Assembly on Tuesday, June 12, 1990.

The members appointed to the Committee were:

Mr. Leroy Legere, MLA
Honourable Ronald Giffin
Honourable Kenneth Streatch
Honourable Brian Young
Mrs. Marie Dechman, MLA
Mr. Guy Brown, MLA
Ms. Sandra Jolly, MLA
Mr. Paul MacEwan, MLA
Mr. John Holm, MLA

Mr. Al Mosher, MLA, permanently replaced the Honourable Brian Young.

Mr. Leroy Legere was appointed chairman of the Committee.

Mrs. Joan Kelly was appointed Secretary/Co-Ordinator of the Committee.

Mr. John MacPherson was appointed legal counsel/researcher-writer to the Committee.

Terms of Reference

The Select Committee was provided with the following terms of reference:

"(a) that the House declare pursuant to the Rules and Forms of Procedure of the House of Assembly that a Select Committee be established receive representation, both written and oral, in respect of Bill 99, An Act to Amend and Revise the Law Respecting Workers' Compensation and to recommend to the Minister of Labour prior to the thirtieth day of October, 1990, any deletions, additions, changes or revisions thereto and to consider and report to the said Minister the observations, opinions and recommendations of the members of the Select Committee respecting any matters pertaining to Workers' Compensation;

(b) that the said Select Committee be composed of nine persons chosen by the Striking Committee, the Chairman of the Select Committee to be the person named as such by the Striking Committee;

(c) that the House declare pursuant to Section 46 of the House of Assembly Act that the said Select Committee not be dissolved by prorogation of the House and that the Select Committee be authorized to continue its inquiry after the House is prorogued;

(d) that notwithstanding the said Rules or any rules of the House, the said Committee of the House be empowered to examine and inquire into all such matters and things as may be referred to the Committee by this House and from time to time report to this House the observations and opinions of the Committee respecting matters and things referred to the Committee and the Committee be further empowered to send for and examine witnesses, papers and records, and to extend to any witness the protection of this House and to hire such staff, clerical or otherwise as it deems necessary;

(e) that the said Committee meet only in the Province touching on matters pertaining to its study, review and recommendations;

(f) that all powers and privileges under the House of Assembly Act and amendments thereto and the Rules of the House applicable to Standing and Select Committees while the House is in Session shall apply and be of full force and effect during the sittings of the Committee; and

(g) that the Legislature Internal Economy Board be authorized to provide the Committee, its members and staff with such facilities and funds as are provided for by and pursuant to Section 80 of the Public Service Act."

Meetings

The Select Committee held the following public meetings:

Yarmouth	-	August 28, 1990
		August 29, 1990
Sydney	-	September 17, 1990
		September 18, 1990
		September 19, 1990

Halifax - October 1-4, 1990
November 14, 1990

During the course of these hearings the Select Committee received representations, both oral and written, from numerous individuals and groups, lists of which are appended to this report as Appendix "A" and Appendix "B".

The Select Committee extends its special thanks to the Honourable Ron Russell, the Minister of Labour, who attended all of the public meetings of the Committee as well as all of the deliberations of the Committee. His assistance in the work of the Select Committee is most appreciated.

Historical Background

Few topics have received the degree of legislative scrutiny and study as injuries to workers in Nova Scotia.

As indicated in "Changing to Meet Today's Challenges", a statement by the Honourable Ron Russell, in November 1989 (the "White Paper") at page 2:

> "The Workers' Compensation Act has been subject to review by two Royal Commissions, 1937 and 1958; two Select Committees of the Legislature, 1974 and 1981; a Labour Committee review in 1978; and, by Ministerial Action Group in 1986."

It is not necessary to refer in detail to the well-known "historical compromise" upon which the foundations of workers' compensation have been built. A useful historical prospective is provided by the Report to the House of Assembly of the Select Committee on Workers Compensation, (May, 1981) - ("the 1981 Select Committee"), pages 6-12, a copy of which is attached to this report as Appendix "C".

That report stated at page 12:

> "... legislation can be viewed as a scheme whereby the rights of both parties are compromised with the worker giving up his full rights of recovery for partial benefits on a no fault basis and a safer workplace and the employer paying an assessment spread throughout the industry as a whole and receiving immunity from common law actions."

In the numerous and diverse submissions received by the Select Committee, no individual or group challenged the basic foundations of the "historical compromise". This Select Committee is in agreement the statements found in "Workers' Compensation of Nova Scotia - 'The Turning Point'", Report of Ministerial Action Group - (1986) - ("the MAG Report") at page 6:

> "Very early in the review process, MAG members realized that few people involved in the Nova Scotia business or labour community desired major changes in the fundamental principle of workers compensation in this province."

Therefore, the report of the Select Committee to review the provisions of Bill 99 is based on the fundamental agreement of all "stakeholders" that the basic premises and principles underlying the current Workers' Compensation Act are sound.

That being said, numerous concerns were expressed with both the provisions of Bill 99, as well as the operation and administration of the Workers' Compensation Board.

The Select Committee makes the following recommendations in respect of those changes to Bill 99 which it believes would address the concerns raised before it in its hearings throughout Nova Scotia.

PART I - STRUCTURAL CHANGES

Since its inception in 1915, the system of workers compensation has been administered by a Workers' Compensation Board and, laterally, by the Workers' Compensation Appeal Board. Both bodies are appointed by the Governor in Council.

Workers' Compensation Board

Many of the representations before the Select Committee dealt with matters not directly relevant to the statutory provisions of Bill 99. Rather, those submissions dealt with numerous criticisms of the day-to-day administrative activities of the Workers' Compensation Board.

Consistent throughout this type of criticism was an underlying frustration expressed by representatives of both employers and workers that they did not have direct input into the day-to-day operation of the Workers' Compensation Board. From the employer's perspective, such input was necessary to ensure fiscal responsibility, given that employers are the sole source of funding for workers' compensation. Worker's representatives expressed the view that the requirements of a fair administration of the legislation could best be achieved with the direct input of workers' representatives at the Board level.

There has been a tendency throughout Canada to depart from the model of full-time appointed Workers' Compensation Boards to "part-time" appointments which reflect the concerns and involvement of "stakeholders" in the Workers' Compensation system.

This Select Committee is of the view that many of the administrative and other problems currently being encountered by both employers and workers in Nova Scotia can be resolved by direct and ongoing input by representatives of workers and employers in the day-to-day operation of the Workers' Compensation Board. Therefore, it is the recommendation of the Select Committee that:

1. "The Workers' Compensation Board should be 'tri-partite' and composed of nine members, appointed by the Governor in Council, as follows:

   (a) a full-time, independent, chief commissioner;

(b) four part-time board members nominated by appropriate groups representing organized labour;

(c) four part-time board members nominated by appropriate groups representing employers covered by the Workers' Compensation Act."

The Select Committee has considered the various submissions of different groups suggesting specific entitlement to representation on the Workers' Compensation Board. It is the view of the Select Committee that the flexibility to adapt to the changing circumstances which may be faced by the Worker's Compensation system in the future is best ensured by leaving the final decision as to the composition of the Workers' Compensation Board to the Governor in Council. However, the Governor in Council should be required to make appointments to the Workers' Compensation Board on the basis of nominations put forward by the various stakeholders in the system.

The Select Committee is cognizant of the fact that this changed structure may cause some initial disruption. In order to lessen such dislocation, the Select Committee therefore recommends that:

2. "The nine members of the Workers' Compensation Board should have staggered appointments, with three members having initial terms of one year, three members having initial terms of two years, and three members, including the chief commissioner, having initial terms of three years. Members should be eligible for reappointment upon the expiry of their terms and subsequent terms should be of three years duration."

In order to achieve the desired goal of informed input from a representative cross-section of Nova Scotians, it is important that the appointees to the Workers' Compensation Board, and as will be dealt with below, the Workers' Compensation Appeal Board, should reflect the demographics of the participants in the Workers' Compensation system. Therefore, the Select Committee recommends that:

3. "Efforts should be made to ensure the members of the Workers' Compensation Board reflect both regional representation and appropriate gender representation."

4. "Efforts should be made to ensure the members of the Board include at least one representative of 'small business'. In addition, at least one representative of organized labour should represent workers in the coal mining industry, preferably by way of representation from the United Mine Workers of America."

A consistent theme in the various reports concerning the Workers' Compensation system has been the appropriate role for the Board of Commissioners of the Workers' Compensation Board. Over time, the role of commissioner has evolved from one largely involved with actual claims adjudication to one concerned more with administration and policy. The Select Committee considers that this evolution should continue and therefore the Committee recommends:

5. "The role of the Board of Commissioners of Workers' Compensation should be one of policy formulation rather than claims adjudication."

WORKERS COMPENSATION APPEAL BOARD

During the course of the public presentations to the Select Committee, the concept of an independent self-administered and external Workers' Compensation Appeal Board was generally supported by most of those who made presentations.

The foregoing comments concerning the appropriateness of stakeholder representation at the Workers' Compensation Board level applies with equal force to the Workers' Compensation Appeal Board. Therefore, the Select Committee recommends that:

6. "The Workers' Compensation Appeal Board should be a tri-partite body.

   The Workers' Compensation Appeal Board should consist of nine individuals as follows:

   (a) one full-time chairperson;

   (b) two part-time vice-chairpersons;

   (c) three representatives of labour, nominated by appropriate groups representing organized labour;

   (d) three representatives of management nominated by appropriate groups representing employers covered by the Workers' Compensation Act.

7. The members of the Workers' Compensation Appeal Board should be appointed by the Governor in Council."

Concerns in respect to the problems caused by a transition in structure from the current Workers' Compensation Appeal Board to that proposed above have also been considered by the Select Committee. Therefore, the Select Committee recommends that:

8. "The members of the Workers' Compensation Appeal Board should initially be appointed for staggered terms of one, two and three years. The chairperson and vice-chairpersons should be appointed for initial terms of three years. All members should

be eligible for reappointment and upon reappointment the term of office should be of three years duration."

As with the Chief Commissioner of the Workers' Compensation Board, the Chairperson and Vice-Chairpersons of the Workers' Compensation Appeal Board must be independent and perceived as such. Therefore, the Select Committee recommends that:

9. "The Chairperson and Vice-Chairpersons of the Workers' Compensation Appeal Board should be independent appointees not representing either labour or management."

PART II - ASSESSMENTS

Because of the intensive interest in Worker's Compensation throughout the years, there have been many amendments made to the original Workers' Compensation Act to address problems of pressing concern. However, prior to Bill 99, there has not been a major coordinated approach to rewriting the Workers' Compensation Act for a considerable period of time.

That resulted in the Nova Scotia Supreme Court, Appeal Division, commenting that:

> "The Act has been revised from time to time resulting in what is sometimes described as a 'scissors-and-paste job'. Hence, the language in the Act is not consistent, resulting in some confusion."

(Mr. Justice Matthews in Hayden v. Workers' Compensation Appeal Board (N.S.) (No. 2) (1990), 96 N.S.R. (2d) 108 at page 112).

Nowhere is this approach more apparent than in the provisions dealing with which industries are covered by Workers' Compensation legislation and which are not. As currently constituted, the structure of the Act requires a business person who wishes to determine whether their operation is covered by the Workers' Compensation legislation to look in a number of places, (Section 2(1)(g), Section 2(1)(w), Section 4, Schedule "B", etc.).

A review of the MAG Report (pages 52-53) demonstrates the type of detailed consideration required if one is to "tinker" with whether certain additional specific industries should be included or excluded from the legislation.

The MAG Report stated at page 47:

> "The MAG finds merit with the principle of universal assessment, that is, all employers, with no exclusions, should be assessed if the employer has three or more employees.
>
> Workers' Compensation is, without doubt, the least expensive form of liability insurance available, and provides employees and employers with the widest

> range of benefits for persons injured in the course of their employment."

Subsequently, the Mag Report stated at page 48:

> "The MAG recommends the principle of UNIVERSAL ASSESSMENT be adopted in Nova Scotia in keeping with the provisions contained in the Charter of Rights and Freedoms and similarly adopting the same logic the MAG is prepared to recommend the principle of UNIVERSAL COVERAGE be adopted in Nova Scotia as well, so that all employees, regardless of the size of the employer they are employed by may avail themselves of the benefits contained in the Workers' Compensation Act of Nova Scotia. Therefore, under this proposal, all employers of one or more employees will be assessed."

The 1981 Select Committee recommended at page 35:

> "The principle that industries should be included unless excluded by the Workers' Compensation Board, should be introduced to alter the present system where the only people who are covered are the ones listed and everyone else is excluded."

Those recommendations found expression in Bill 99 in Section 3:

> "3 (1) Subject to subsection (2), this Act applies to all employers and workers engaged in, about or in connection with an industry employing more than two workers in the Province.
>
> (2) This Act does not apply to those industries, employers and workers that are, on the recommendation of the Board, excluded by regulation from the application of this Act.
>
> (3) Notwithstanding subsections (1) and (2), the Board may, by order, on the application of an employer, determine that this Act applies to the employer, to any worker or to the industry."

During the course its hearings, the Select Committee received representations from certain employers and unions suggesting the current level of benefits provided to their employees was in excess of that which they could expect to receive pursuant to the Workers' Compensation Act. They therefore requested that their industry should be exempted from the coverage of the Workers' Compensation Act.

It is the view of the Select Committee that it does not have the necessary expertise or overall prospective to make determinations as to which industries, if any, might be appropriate for exclusion from coverage pursuant to the Workers' Compensation Act. The Select Committee believes that the provisions found in Bill 99 are adequate to enable those industries, employers and workers who believe that they should not be covered pursuant to the legislation to make appropriate representations for exclusion.

The Select Committee therefore recommends that:

10. "The coverage of the Workers' Compensation Act should be universal for employers employing more than two workers except where the Board determines otherwise."

The recommendation for universal assessment will extend the coverage of the Workers' Compensation Act to a large number of industries which are currently not assessed pursuant to that legislation. The Select Committee believes that it should be a priority of the newly constituted Workers' Compensation Board that it review the new industries which will be covered by universal assessment to determine whether their inclusion within the coverage of the Act is appropriate. This is particularly so in respect of teachers, universities, and the farming industry.

Therefore the Select Committee recommends:

11. "The Workers' Compensation Board should examine each of the industries which will be included under the Workers' Compensation Act through universal assessment to determine whether they currently provide a level of benefits equal to or superior to that which will be provided to employees under the Workers' Compensation Act. The decision of the Workers' Compensation Board as to whether such industries should be included under

the provisions of the Act may be appealed to the Workers' Compensation Appeal Board."

Presently, employers who are covered under the Workers' Compensation Act are levied at the beginning of each year for the estimated amount of their assessments. This amount is adjusted at the year end, based upon the actual level of the employer's payroll during the course of the year.

It is the view of the Select Committee that this method of assessment is inflexible and may penalize employers, especially small businesses, who may not be in a cash flow position to easily absorb costs in one lump payment. It is the view of the Select Committee that there should be flexibility with respect to the collection of assessments and, in particular, the Workers' Compensation Board should bill the employers on a quarterly basis for their assessments.

The Select Committee therefore recommends that.

12. "Employers should be billed on a quarterly basis for their assessments under the Workers' Compensation Act."

Merit or Experience Rating System

It is trite to say that the "best injury" is the "injury which never happens". All studies in this Province, and elsewhere, dealing with Workers' Compensation have emphasized that a primary consideration must be the prevention of injuries.

The 1981 Select Committee Report stated at page 5:

> "In our approach to suggesting improvements in our system of workers' compensation we accepted the traditional order of priorities, i.e. accident prevention, rehabilitation, and then improvement of benefits..."

In respect to the first of these matters, the 1981 Select Committee stated at page 13:

> "Accident prevention is, in the opinion of this committee, one principle area of concern. A much greater emphasis in this

> field can reduce the cost associated with Workers' Compensation both in human and economic terms.
>
> The recent report of the Workers' Compensation Study Committee in New Brunswick and the report of Paul C. Weiler note this fact as have many previous other reports by study committees, commissions and individuals. Mr. Weiler at page 25 expresses this by stating:
>
> 'it (the Board) will never undo the pain and disruption of the original accident and recuperation, nor repair a body which has been maimed forever. Thus the goal towards which we must always steer is prevention of the accident and injury in the first place, rather than concentrate simply on compensation and rehabilitation after the fact.'"

A number of specific industries and industry groups made forceful representations to the Select Committee concerning the considerable efforts - and money - they have expended in improving their safety record. Of particular note are the efforts made by the forestry industry in this regard.

Those industries and others, however, commented upon the lack of a concrete incentive for employers to improve their specific accident rating. Although their accident records may have improved dramatically, their level of assessments have continually increased.

This argument for "merit" or "experience" rating is often counter-balanced by a concern that such an approach will lead to abuses such as employers pressuring their employees not to report accidents. This matter was address by the 1981 Select Committee who stated at page 17 of its report:

> "...We believe also that any objection based on the intimidation of employees with respect to filing accident reports can be overcome by making such conduct an offence. Also, it has not been the experience in other jurisdictions that this is a common occurrence."

On balance, the Select Committee is of the view that a "merit" or "experience" rating system should be implemented in Nova Scotia. Therefore, the Select Committee recommends that:

13. "A merit rating system for employers should be implemented. This system should review the previous two years experience of the employer. If there has been a decrease in the occurrence of accidents for the employer during that time frame, this decrease should be reflected by a decrease in that employer's assessment."

A number of employer groups told the Select Committee that the current broad categories of assessment do not necessarily reflect the types of risks inherent in the particular employment situation of an individual employer.

A specific example is a mining operation where there are greatly varying degrees of risks between the underground operation and such surface operations as the warehouse and the office.

To accommodate this concern as well as the rapidly expanding numbers of different types of enterprises in which Nova Scotian's are currently engaged, the Select Committee recommends that:

14. "There should be an increase in the number of categories of employer assessment, modeled upon the current Ontario system, resulting in the addition of additional categories of assessment."

PART III - REHABILITATION

A consistent theme of virtually every report, study and article on Workers' Compensation is that, short of prevention, the most cost effective way of implementing the system of Workers' Compensation is to ensure speedy and effective rehabilitation of injured workers.

For example, the MAG Report stated at page 35:

> "Paramount in all activities of Vocational Rehabilitation Services should be early referral from claims to rehab and early re-activation of injured workers to suitable employment."

The MAG Committee was of the view that the current provision of the Workers' Compensation Act, then section 72 (now section 83) was sufficient to allow the Workers' Compensation Board to administratively undertake the steps required to establish an effective rehabilitation service.

The Select Committee disagrees with this view. The Select Committee believes that the current provisions of the Act allow the Workers' Compensation Board and the Worker's Compensation Appeal Board to treat rehabilitation as a discretionary privilege rather than the right of every injured worker.

It is only if rehabilitation is a right to which every worker has entitlement that it will be given its proper position of importance within the scheme of Workers' Compensation. Therefore the Select Committee recommends that:

15. "Rehabilitation is the right of every injured worker and should not be a discretionary benefit which may be conferred upon injured workers by the Workers' Compensation Board. The Workers' Compensation Act should be amended to state:

> 'Rehabilitation services shall be provided, upon receipt of an appropriate medical specialists recommendation, to any injured worker who has been continuously disabled

from work for a period in excess of 60 days.'"

The above suggested amendment would provide every worker, whose treating specialist believes that rehabilitation would be useful, the right to obtain appropriate rehabilitation services from the Workers' Compensation Board.

To be effective, rehabilitation services must be properly funded. In order to assess the degree of commitment afforded to rehabilitation, the Select Committee recommends that:

16. "The Board should establish a special fund for the provision of rehabilitation services. The fund should be used exclusively for rehabilitation services as provided for under the provisions of the Workers' Compensation Act."

Section 72(2) and (3) of Bill 99 provide the Workers' Compensation Board with the authority to terminate payments to a worker where the worker does not fulfil his duties and obligations in regard to the receipt of rehabilitation services.

The Select Committee is of the view that such a provision, while necessary, must be tempered with the ability of the worker to explain any apparent failure to abide by an established rehabilitation program. Therefore, the Select Committee recommends that Section 72(2) be amended to state:

17. "Where, in the opinion of the Board, the worker does not fulfill the workers' duties or obligations pursuant to the agreement referred to in subsection 1, the Board may terminate or suspend compensation payments to the worker after consultation between the worker and their relevant rehabilitation counsellor."

PART IV - DEFINITIONS

Injury

Bill 99 defines injury in Section 2(1)(j) as:

> " 'injury' means,
>
> (i) a wilful and intentional act not being the act of the worker,
>
> (ii) a fortuitous event occasioned by a physical or natural cause,
>
> (iii) physical impairment including physical impairment caused by repetitive motion,
>
> (iv) mental impairment caused by a single traumatic event,
>
> (v) a disease,
>
> arising out of and in the course of employment."

Some concerns were expressed that this definition was not sufficiently precise to prevent the expansion of Workers' Compensation into a "social welfare" program.

It is the view of the Select Committee that the definition in Bill 99 is an improvement over the current situation in that it specifically defines an injury as including "physical impairment caused by repetitive motion". It also specifically recognizes "mental impairment caused by a single traumatic event" as being compensable.

Therefore, the Select Committee recommends that:

18. "The definition of injury found in Section 2(1)(j) of Bill 99 should remain unchanged."

Industrial Disease

Serious concern was expressed to the Select Committee by a number of those who appeared before it in respect to the recent decision of the Nova Scotia Supreme Court, Appeal Division, which decided that a worker who suffers a permanent

medical impairment as a result of an industrial disease, for example hearing loss, but does not suffer any loss of wages, is not entitled to a permanent partial disability award under the current Workers' Compensation Act.

The past practice of both the Workers' Compensation Board and the Workers' Compensation Appeal Board, has been to provide permanent partial disability awards to workers suffering from industrial diseases on the basis of permanent medical impairment. Such awards were provided whether or not the injured worker had suffered actual loss of earnings.

It is the view of the Select Committee that the previous practice of the Workers' Compensation Board and Workers' Compensation Appeal Board was appropriate given the underlying philosophy of the Workers' Compensation Act. Therefore, the Select Committee recommends that:

19. "Bill 99 should be amended to state that it will not be necessary for an injured worker, who suffers from industrial disease, including hearing loss, to demonstrate an actual loss of earnings in order to be compensated for permanent medical impairment arising from the industrial injury."

There were submissions made to the Select Committee that the definition of industrial disease should be changed. The Select Committee believes that the definition of industrial disease found in Bill 99 is sufficiently flexible to meet the needs of injured workers. Therefore, the Select Committee recommends that:

20. "The definition of industrial disease found in section 2(e) of Bill 99 should not be changed."

Pre-Injury Earnings - Section 2(1)(u)

Bill 99 defines pre-injury earnings as:

> "'pre-injury earnings' means the lesser of
>
> (i) a worker's net earnings from all employment as defined herein in the period of twelve months immediately preceding the

commencement of loss of earnings as a result of the injury and all unemployment insurance benefits, divided by the total number of weeks during the twelve month period the worker received either earnings or unemployment insurance benefits, times 0.90, or

(ii) the maximum assessable earnings expressed in terms of weekly earnings;"

The calculation of pre-injury earnings is significant in the context of the determination of temporary total disability benefits as being 90 percent the employee's pre-injury earnings. The current system of determining an employee's pre-injury earnings as of the date of injury may have the effect of overcompensating a particular worker who has not been employed on a regular basis and may thereby inflict upon the system costs which are not warranted.

It is the view of the Select Committee that consideration of the net earnings of an employee from all employment together with any unemployment insurance benefits to which he/she may have been entitled provides a more accurate measure of the employee's actual loss of earnings as a result of a compensable work injury.

However, the Select Committee has a concern in regard to the time frame of 12 months as expressed in Bill 99. It is the view of the Select Committee that a longer time frame, 24 months, would provide a more accurate reflection of the worker's particular employment history.

Therefore, the Select Committee recommends that:

21. "The definition of pre-injury earnings should be amended to consider a worker's net earnings from all employment in the period 24 months immediately preceding the commencement of loss of earnings as a result of the injury and all unemployment insurance benefits, divided by the total number of weeks during the 24 month period the worker receives either earnings or unemployment insurance benefits, times 0.90."

Post Injury Earnings - Section 2(1)(t)

Bill 99 defines "post injury earnings" as:

> "(t) 'post injury earnings' means the aggregate of
>
> (i) one hundred per cent of any periodic pension currently paid by the Board pursuant to this Act or any predecessor legislation expressed in terms of weekly earnings,
>
> (ii) fifty per cent of Canada Pension Plan disability benefits received by the worker expressed in terms of weekly earnings,
>
> and the greater of
>
> (iii) ninety per cent of a worker's net earnings earned from all employment after the commencement of loss of earnings as a result of the injury, divided by the number of weeks the worker has worked after the commencement of loss of earnings as a result of the injury, or
>
> (iv) an amount the Board estimates that the worker is capable of earning expressed in terms of weekly earnings."

A number of representatives of unionized workers indicated that their unions had obtained, through collective bargaining, a provision for the "topping up" of workers' compensation benefits for injured workers by their employers. Under the current system of Workers' Compensation, an employee is entitled to 75 percent of his gross wages as temporary total disability benefits. The "topping up" provisions in collective agreements provide that the employer will pay the additional 25 percent of gross wages to the employee so that, in effect, the employee is in exactly the same position as if an injury had not occurred.

There was a concern expressed that the definition of "post-injury earnings" found in Bill 99 would have the effect of penalizing employees whose unions had negotiated "top up" provisions.

It was the Committee's view that similar difficulties will be encountered by employees who had, from their own funds, purchased private insurance plans which would have the same effect of "topping up" their income in the case of a compensable injury.

Therefore, it is the recommendation of the Select Committee that:

22. "Bill 99 should be amended to clearly indicate that 'topping up' benefits received by an injured worker from his employer under a collective agreement, as well as any similar benefits an employee might receive through private plans paid for by the worker, should not be included in the definition of post injury earnings found in section 2(1)(t)."

Casual Workers - Section 2(1)(y) (xiv)

Bill 99 excludes from the coverage of the Workers' Compensation Act certain classes of workers, including those found in Section 2(1)(y)(xiv):

> "an individual whose employment is of a casual nature and otherwise than for the purpose of the industry."

This provision raised the concern of some who appeared before the Select Committee in that it allows the possibility that "casual" workers might not be covered under the Act. Currently, those who appear on employer's payroll, even on a "casual" basis, are provided with workers' compensation coverage.

The current Workers' Compensation Act states:

> "Section 4(2):
>
> 'Subject to Section 6, this Part shall not apply to the following:

(a) persons whose employment is of a casual nature when they are employed otherwise than for the purposes of the employer's trade or business."

While the wording proposed in Bill 99 varies only slightly from that in the current legislation, it may have the unintended affect of excluding from coverage certain workers who currently have the benefits of coverage under the Workers' Compensation Act. It is the Select Committees understanding that this was not the intent of the wording of Bill 99. Therefore, to clarify this point, the Select Committee recommends that:

23. "Section 2(1)(y)(xiv) of Bill 99 should be deleted and replaced with the current wording in respect to casual workers found in the Workers' Compensation Act, Section 4(2)(a)."

PART V - WORKERS' BENEFITS

Death Benefits

Concern was expressed that the recent improvements in the benefits provided to the surviving spouse of an injured worker who dies as a result of his/her work injuries were not being maintained by the provisions of Bill 99.

It is the view of the Select Committee that the current provisions set forth in O.I.C. 89-401 in regard to death benefits are adequate and should be continued in any subsequent Workers' Compensation legislation. Therefore, the Select Committee recommends that:

24. "The level of benefits provided in the case of the death of worker should remain at the levels currently in force."

Permanent Total Disability

Similarly, concerns were expressed that the provisions of Bill 99 would impact negatively upon those injured workers receiving permanent total disability as well as the dependents of those workers.

The Select Committee is of the view that the current benefit structure in respect of workers receiving permanent total disability benefits is adequate.

Therefore, the Select Committee recommends that:

25. "The current level of benefits for workers on permanent total disability and their dependents should be continued."

Maximum Accessible Earnings

Concerns were expressed by certain employer representatives that the escalating level of maximum assessment for workers had seriously increased their overall assessment levels.

Conversely, representatives of certain employee groups indicated that a maximum level of assessment of $36,000 per annum did not cover the average earnings of a substantial portion of their membership.

The Select Committee is of the view that the current level of maximum assessment adequately balances the interests of both employers and workers. Therefore the Select Committee recommends that:

26. "The current maximum level of earrings of $36,000 per annum should remain in place subject to adjustments from time to time as required."

Older Workers Benefits

Section 40 of Bill 99 states:

> "40 A worker may elect to receive an amount equal to a full monthly pension for old age security pursuant to Section 3 of the Old Age Security Act (Canada), including amendments thereto, instead of the amount of compensation determined pursuant to Section 38 or 41 if the worker
>
> (a) is at least fifty-five years of age when the Board determines or reviews the amount of the worker's compensation;
>
> (b) has not returned to work; and
>
> (c) is unlikely, in the opinion of the Board, to benefit from a vocational rehabilitation program."

This recommendation followed upon the "White Paper" which stated at page 15:

> "Workers age 55 and older injured in the workplace are often difficult to place in effective rehabilitation programs which lead to acceptable employment opportunities.
>
> The proposed legislation will provide measures whereby workers age 55 and older, who are in receipt of compensation benefits, may elect to receive a monthly payment equal to what they would receive

as Old Age Security if the amount they are receiving is less that their Old Age Security entitlement.

This payment would continue until age 65."

The intent of the older worker provision is to assist those older workers who, because of the circumstance of a compensable injury, will not be able to re-integrate themselves into the workforce. It was not intended to be an "early retirement" scheme for workers who would otherwise be able to continue in gainful employment even though they had received a compensable work injury.

Therefore, the Select Committee recommends that:

27. "Older worker benefits found in section 40 of Bill 99 should be amended to indicate that the benefits provided to older workers should only apply in cases where such workers are required to leave the workforce due to injury rather than voluntary retirement."

Indexation of Benefits

Workers' Compensation Benefits have been indexed to enable older injured workers to keep pace with costs of living as opposed to being faced with a steady erosion of their income based upon a fixed amount of compensation determined as of the date of an injury. In general, while expensive, the system of indexation of Workers' Compensation has worked well.

Therefore, the Select Committee recommends that:

28. "Provisions found in the current legislation concerning minimum levels of compensation and the indexing of benefits should be continued"

However, there is some concern that the indexation of benefits to the Consumer Price Index is not an effective method of accurately reflecting the wage loss which a worker has suffered. The Consumer Price Index reflects the costs with which a worker is faced.

A more accurate indicator of the likely wage increase which a worker would receive if they had not been injured is the average industrial wage for the Province of Nova Scotia. Therefore the Select Committee recommends that:

29. "Workers' Compensation Benefits should be indexed to the increase in the average industrial wage of the Province of Nova Scotia rather than the Consumer Price Index for the Province of Nova Scotia."

Section 42(2) of Bill 99

Section 42(2) of Bill 99 states:

> "(2) The Board may suspend payment to a worker or a dependent spouse of a worker of any compensation based on the loss of earnings during any period in which the worker or the dependent spouse is unavailable for employment for a cause unrelated to the injury."

The Select Committee is of the view that the unavailability for employment of a worker "for a cause unrelated to the injury" is not a valid consideration pursuant to the Workers Compensation Act. The more appropriate determinate is whether an injured worker is capable of gainful employment pursuant to the other provisions of the legislation.

Therefore the Select Committee recommends that:

30. "Section 42(2) of Bill 99 should be deleted."

Section 14(1)

Section 14(1) of Bill 99 provides that the worker or his dependant who intends to bring an action at common law has three months from the date of injury to provide notice to the Board, in writing, of his intention to commence an action.

The current Workers' Compensation Act, Section 17(1) provides six months within which such notice must be provided to the Board.

It is the view of the Select Committee that there is no reason to shorten the notice period from six months to three months. Therefore, the Select Committee recommends that:

31. "Section 14(1) of Bill 99 should be amended so that a worker or a worker's dependant has six months from the date of injury to give notice to the Board that they intend to commence a legal action."

Section 23(2)

Section 23(2) of Bill 99 states:

> "(2) The notice referred to in subsection 1 shall be given:
>
> (a) as soon as possible after the injury sustained and before the worker has voluntarily left the employment in which the worker was injured; and
>
> (b) within six months from the date of the injury or in the case of death, six months from the date of death."

Upon extensive review of this provision, it is apparent to the Select Committee that the "notice" provisions contained in Section 23 are unclear in their application. It is the view of the Select Committee that provisions in respect of notice of injury should be different than the provisions dealing with notice in the case of the death of a worker. Therefore, the Select Committee recommends that:

32. "A worker must give notification of injury, other than industrial disease, to his/her employer as soon as possible after the injury is sustained and before the worker has voluntarily left the employment in which the worker was injured.

33. In the case of an industrial disease, the worker must give notice of injury to his/her employer within six months from the date the worker is diagnosed as having an industrial disease.

34. Dependants of an injured worker must give notice of injury in respect of either a

work injury or an industrial disease to the deceased worker's employer within six months from the date of death."

Termination of Benefits

The Select Committee heard numerous complaints from workers whose benefits had been abruptly discontinued. In rare cases, workers received notification of the discontinuance of their benefits some time after the actual benefits had ceased to be paid.

One of the principles of Workers Compensation is to provide wage continuity while an injured worker is recovering from a work injury. Inadequate notification obviously is not consistent with this principle. Moreover, it does not provide the injured worker with an adequate opportunity for reintegration into the work force or to provide the Board with additional medical and other information which might be of such a nature as to cause the Board to re-consider its decision to terminate benefits.

On the other hand, given the volume of claims with which the Workers Compensation Board deals, it is not possible in those cases involving short periods of temporary total disability to provide a lengthy period of notice of discontinuance of benefits. Any rigid rule in that regard might lead to the absurdity of the length of notice being longer than the period of entitlement.

Therefore, the Select Committee recommends that:

35. "Any worker who is in receipt of temporary total disability benefits for a period in excess of one month should receive a minimum of two weeks' written notice prior to the termination of benefits. The notice of termination of benefits should be included with the cheque forwarded to the worker in respect of compensation benefits."

A special problem is presented by those workers who have had a lengthy period of temporary total disability benefits. Quite often, such workers are in the care of a specialist. A great deal of the frustration faced by such workers results from the termination of benefits on the basis of the medical opinion of a Workers Compensation Board physician which may or

may not have been rendered following a physical examination. To avoid difficulties which arise from this situation, the Select Committee recommends that:

36. "If an injured worker has been in receipt of temporary total disability benefits on a continuous basis for twelve months or more, those benefits should not be discontinued without examination by an independent medical specialist."

Section 24

Bill 99, in Section 24, includes the provisions found in the current legislation in Section 31. The Select Committee is of the view that workers who persist in practices which are such as will retard their recovery should be subject to discontinuance of compensation. However, it is the view of the Select Committee that the current wording of Section 24 is unsatisfactory in respect to references to such matters as "unsanitary or injurious practices". Therefore, the Select Committee recommends that:

37. "Section 24(1) of Bill 99 should be reworded to provide that any worker who persists in actions which might impair his/her recovery or refuses to submit to reasonably essential medical treatment may have his/her benefits reduced or suspended"

Permanent Medical Impairment and Permanent Partial Disability Awards

Only a very small percentage of the workers who file claims with the Workers Compensation Board have suffered sufficiently serious injuries to result in the award of a permanent partial disability pension. However, it is this minority of claims which cause a great number of the criticisms of the Workers' Compensation system. This is particularly so in those cases where the degree of physical impairment may be relatively minor but the impact of the injury on the worker's ability to maintain his/her livelihood is disastrous.

All of those engaged in the Workers Compensation system have wrestled with the best approach which should be taken to resolve this difficult question. There has been much criticism of reliance upon the degree of permanent medical

impairment ("PMI") as the sole determinant of the degree of permanent partial disability which a worker should receive under the Workers Compensation Act.

This matter was addressed in the 1981 Select Committee Report at page 24:

> "The Compensation Board in this Province like most of the Boards in Canada pays a pension to such individuals based upon an objective disability evaluation schedule. Every person with the same injury receives the same percentage pension which in itself may superficially appear to render some type of justice although it may only be rough justice. The use of the "Physical Disability Evaluation Schedule" scornfully referred to by many as the "meat chart" method may in theory ensure "average" justice but something has to be done in this committee's opinion to alleviate the tragic consequences for the individual whose disability does not meet the average percentage award."

The 1981 Select Committee went on to state at page 25:

> "This committee during its study has exhaustively discussed the introduction of a plan which relates to maintenance of earnings in all circumstances and we embrace the principle. Workers' Compensation is not welfare, it is a right which arises out of a workers' employment and the plan should strive to place the worker in the same position earnings wise after the accident as prior to the accident."

This same issue was discussed in the White Paper which proposed a system whereby workers would be compensated for both their disability (permanent medical impairment) as well as for any loss of income experienced due to the work-related injury (wage loss benefits).

It is apparent to the Committee that even under the current wording of the Act, a system of permanent partial disability awards based solely on permanent medical impairment is no longer valid. In that regard, reference is made to the decision of the Nova Scotia Supreme Court, Appeal Division, in

Hayden v. Workers' Compensation Appeal Board (N.S.) (No.2) (1990), 96 N.S.R. (2d) 108, wherein Mr. Justice Matthews states at page 114:

> ". . . A reading of ss. 36 and 38 in the context of what I perceive as the philosophy of the Act reveals that compensation is to be determined by the Board and Appeal Board on the basis of the loss of earnings occasioned by an injury which resulted in the disability. It follows that it is not sufficient for the Board or Appeal Board to merely apply a degree of "physical impairment" as found by the medical doctor, as it did here when determining the award." (emphasis added)

The White Paper suggested a system whereby a worker with a permanent medical impairment would receive a lump sum payment. Subsequently, wage loss benefits would be provided to an injured worker based on 90 per cent of the difference between the net amount the worker earned prior to the injury and the net amount the worker is earning or is estimated to be able to earn after the injury.

This proposal in the White Paper addressed the concerns of workers who indicated that those workers who sustained permanent medical impairment as a result of a work injury, even though they may return to their previous job at the same rate of pay, still have suffered "legal damages" which would have entitled them to a monetary award, had they had the right to successfully pursue a claim against their employer at common law.

It is the view of the Select Committee that the Workers' Compensation Act should provide payment for the loss occasioned to injured workers as a result of a compensable injury. However, the Select Committee is of the view that the "sliding scale" proposed in the White Paper is inappropriate and that the degree of permanent medical impairment should not be dependent upon the age of the worker.

Therefore, the Select Committee recommends that:

38. "A worker who suffers permanent medical impairment as a result of an injury should receive a lump-sum payment in respect of the physical impairment which he/she has suffered."

As mentioned previously, the most serious difficulties encountered with the Workers Compensation Act involve those workers who suffer tremendous wage loss as a result of a compensable work injury. This concept was addressed by Chief Justice MacKinnon in his "Report - Workers Compensation Commission, December 18, 1958" wherein he stated at page 62:

> "The reason for computing earnings is an attempt to fairly approximate the earning capacity of the injured workman. His injury is a disability which will fetter in whole or in part his future earning capacity."

The Select Committee is of the view that the wage loss benefits provided in Bill 99 are a considerable advance over the system currently in place. However, the Select Committee has a concern that the estimation of the ability to earn future income should be done in a manner which fairly considers the many factors which can influence any individual's earning capability. Therefore, the Workers' Compensation Board or the Workers' Compensation Appeal Board must take into account the widest possible range of factors when they apply the provisions of Section 2(1)(t)(iv):

> "an amount the Board estimates that the worker is capable of earning expressed in terms of weekly earnings"

Therefore, the Select Committee recommends that:

39. "In determining an employee's future loss of earnings, the Workers Compensation Board or the Workers' Compensation Appeal Board should consider the following factors, which list is not exclusive:

    (b) age

    (c) occupational history

    (d) experience

    (e) skills

    (f) education

    (g) language

(h) labour market conditions as they relate to the individual's particular needs, abilities and circumstances

(i) rehabilitation potential.

The purpose of the review of these factors is to ensure that a worker's actual loss of earnings from the injury is compensated."

Because medical conditions, by their nature, evolve over time, it is possible that a workers' loss of earnings capability may either increase or decrease over time. For that reason, it is in the best interests of both the worker and others involved with the Workers' Compensation system that there be a system of periodic review of permanent partial disability awards.

Therefore, the Select Committee recommends that:

40. "There should be a periodic review of permanent partial disability awards to determine whether a worker's permanent partial disability has changed."

Section 36(3)

Section 36(3) of Bill 99 requires that a worker must suffer a "significant deterioration of condition" before being able to apply to the Board for reconsideration of their percentage of permanent impairment.

The Select Committee believes that this wording may lead to unnecessary disputes as to the degree of deterioration which is required in order that it be "significant" such as to prompt the review of a worker's condition.

It is the view of the Select Committee that any deterioration in a worker's condition should entitle that worker to have a review of the percentage of permanent impairment which he/she has been awarded as a result of a work injury.

Therefore, the Select Committee recommends that:

41. "Section 36(3) of Bill 99 should be amended by the deletion of the word 'significant' found in the second line thereof."

PART VI - CURRENT LEGISLATIVE PROVISIONS

Pre-Existing Conditions

Section 9(2) of the current Workers' Compensation Act states:

> "Where the personal injury by accident results in injury or disease due in part to the employment and in part due to causes other than to the employment or where the personal injury aggravates, activates or accelerates a disease or disability existing prior to the injury, compensation shall be payable for such proportion of the disability and disablement as may be reasonably be attributed to the personal injury sustained."

This provision had been amended in 1982 to clarify that pre-existing diseases or conditions which had not prior to a compensable injury impacted on a workers' ability to earn a living should not be considered relevant in assessing the degree of disability suffered by a worker as a result of compensable work injury.

The report to the 1981 Select Committee stated at page 63:

> "Very specific legislative changes have been proposed to this Committee, and in view of the rather dramatic change in some procedures and methods that have been outlined, some of these will no longer be relevant. However, section 7(2) of the present Act has been consistently quoted by many parties as a provision which must be altered. This committee accepts that in certain conditions such as back cases where there is a good employment history that it is most unfair to reduce or eliminate benefits on the basis of a heretofore latent (and in the claimant's mind non-existent) condition. Therefore, this committee recommends:
>
> *'That Section 7(2) of the Act be altered so that there must be a pre-*

> *existing disability rather than a condition.'*
>
> It thus becomes more than a medical question but reflects the claimants work history and provides what we believe to be a fair assessment."

This legislative provision was also considered in the MAG Report at page 45:

> "Pre-Existing Condition
>
> The MAG has examined Section 7(2) of the Act and is of the opinion this section adequately addresses the issue of pre-existing condition by allowing compensation for aggravation, activation or acceleration of an existing disability, if in fact that disability is relatable to a job associable injury."

The equivalent provision to Section 7(2) (Section 9(2)) is found in Section 5(3) of Bill 99:

> "Where the injury arising out of and in the course of employment results in injury or disease due in part to the employment and in part due to causes other than the employment or where the injury aggravates, activates, or accelerates a disease or impairment existing prior to the injury, compensation is payable for that portion of the impairment as may reasonably be attributable to the injury arising out of and in the course of employment." (emphasis added)

The principal change in Section 5(3), from Section 9(2), is the substitution of the word "impairment" for the word "disability".

While at first this may not appear to have great significance, this change can be seen to be of some importance when the definition of "impairment" found in Section 2(1)(h) is examined:

> "(h) 'Impairment' in relation to an injured worker, means a physical or functional abnormality or loss, including disfigurement, that results from an injury." (emphasis added)

A number of submissions were made to the effect that the provisions found in Bill 99 would "turn back the clock" to the pre-1982 situation. In the words of one submission:

> "After a great deal of controversy over the years, the present Workers' Compensation Act was amended in 1982 to prevent the Board from reducing compensation from workers who were labelled as suffering a 'pre-existing condition'. Section 5(3) of Bill 99 restores the pre-1982 provision by permitting deductions and reductions in compensation where there is any abnormality pre-existing the injury. This was not proposed in the MAG Report, nor in the White Paper, and is inconsistent with the government's policy represented by the change of legislation in 1982. ..."

It was clear from all the submissions made to the Select Committee that the provisions found in Section 9(2) of the present legislation should not be changed. Therefore, the Select Committee recommends that:

42. "The current provisions of the Workers' Compensation Act, Section 9(2), concerning pre-existing conditions, should not be changed. If the impact of Section 5(3) of Bill 99 is to change the current situation in respect to pre-existing conditions, this should not occur and Bill 99 should be amended to reflect provisions currently found in Section 9(2) of the Workers' Compensation Act."

Recurrences

Concerns were expressed that Bill 99 did not reflect the current provisions found in Section 39 of the Workers' Compensation Act which provide that a worker who suffers a

recurrence of disability as a result of compensable work injury will receive, upon the recurrence, the greater of compensation based either on the worker's earnings prior to his original accident or his average weekly earnings during the twelve months immediately preceding the occurrence of the disability.

All of the submissions to the Select Committee in regard to this topic were highly supportive of the current legislation. Therefore, the Select Committee recommends that:

43. "The current provisions of the Workers' Compensation Act in respect to recurrences should remain unchanged."

Privative Clause

The current Workers' Compensation Act contains what is known as a "privative clause" which is designed to protect decisions by the Workers' Compensation Board and the Workers' Compensation Appeal Board from judicial review, except in cases where those bodies have committed errors of law or jurisdiction.

The protection of such a clause appears to be extended to the Workers' Compensation Appeal Board in Bill 99 in Section 145(3).

However, it appears that there is not a similar provision with respect to decisions of the Workers' Compensation Board.

Therefore, the Select Committee recommends that:

44. "It appears that the Bill 99 does not contain a 'privative clause' protecting decisions of the Workers' Compensation Board from review by the courts in respect of errors other than errors of law or errors going to jurisdiction. The new legislation should contain such a privative clause."

PART VII - MEDICAL EXAMINATIONS

Workers' Compensation Board Physicians

Throughout recent examinations of the Workers' Compensation system in this and other provinces, there has been a continuing concern on the part of claimants in regard to the degree of involvement in claims adjudication by physicians on the permanent staff of the Workers' Compensation Board.

Many claimants and their representatives have indicated their belief that those physicians have played an active role in claims adjudication, often to the extent of overruling medical opinions provided by specialists who are treating the injured worker.

This issue was discussed at some length in the MAG Report which stated at pages 37-39:

> "Perhaps no other body came under as much criticism as the Medical Division of the Workers' Compensation Board during the public and private hearing process.
>
> Some of this criticism is warranted and some of the criticism was unfairly directed towards the medical division; however, this statement notwithstanding, the preponderance of information presented to the MAG indicates the necessity for a fundamental change in the approach of providing medical services through the workers' compensation system of this province.
>
> The MAG is adamant the medical officers of the Workers' Compensation Board of Nova Scotia have absolutely no role to play in the claims adjudicative process. In fact, the classification of doctors as 'medical officers' at the Workers' Compensation Board should be changed to "medical advisors' to reflect that philosophy.
>
> The role of the medical advisors should be confined to providing medical impairment ratings and responding to requests from claims adjudicators for clarification of

medical condition, treatment or medical terminology.

The Director of Medical Services should and must undertake a major information program designed to educate and inform family physicians and health specialists of the unique and important role they play in the workers' compensation programs of Nova Scotia.

The Director of Medical Services should undertake an information program designed to educate family physicians and health specialists of the medical impairment rating schedules in use by the Board so that medical impairment ratings conducted by treating physicians and health specialists are more in line with the medical policies and procedures of the Workers' Compensation Board of Nova Scotia.

The medical advisors of the Workers' Compensation Board should not actively intervene in the treatment of injured workers. The monitoring of treatment, except in the most extreme cases, should be left to the treating physician.

Should a medical advisor of the WCB express concern in regard to the method, timeliness or progress of treatment ordered by a treating physician then the medical advisor may require the injured worker to be referred to a specialist."

In this type of situation, it is often difficult to sift fact from perception. However, in order for the integrity of the system to be maintained, it is the recommendation of the Select Committee that:

45. "The Workers' Compensation Act should be amended to prohibit any participation in the claims adjudication process by physicians permanently employed by the Workers' Compensation Board. The role of these physicians should be limited to one

> of being a medical advisor to the Board and more specifically the role of the physicians employed by the Workers' Compensation Board should be:
>
> (a) to provide advice on medical matters and assisting staff in decision making;
>
> (b) the doctor should not become involved directly in claims adjudication;
>
> (c) the doctor should not become involved in file management;
>
> (d) the doctor should be limited to describing the medical condition only;
>
> (e) the doctor should assist in interpreting medical reports for other staff."

Duty to Submit to Medical Examination

The current Workers' Compensation Act, Section 64, states:

> "(1) A worker who claims compensation or to whom compensation is payable in respect of an accident happening after the tenth day of April, 1952, shall, if so required by his employer, submit himself for examination by a duly qualified and registered medical practitioner, chosen and paid by the employer, and shall in addition, if so required by the Board, submit himself for examination by a medical referee chosen by the Minister of Labour, and the report of the said referee shall be considered by the Board before deciding the worker's claim for compensation.
>
> (2) If a worker does not submit himself for examination when required to do so as provided in subsection (1), or on being required to do so does not submit himself for examination to a medical referee under that subsection, or in any way obstructs the examination, his right to compensation, or if he is in receipt of a

> weekly or other periodical payment, his right to it may be suspended until such examination has taken place."

Equivalent provisions are not found in Bill 99. The Select Committee received a number of submissions from employer representatives indicating that the ability to request an injured worker to undergo an examination by the physician of an employer's choice was considered to be a significant employer right which had been deleted in the proposed legislation.

Employers forcefully argued that given the otherwise limited access to the adjudication process at both the Workers' Compensation Board and the Workers' Compensation Appeal Board levels that this ability to require medical examinations provided the employer with an effective method of claims control.

One employer submission expressed their concerns as follows:

> "We recommend that Section 52 be retained in the legislation as employers find this right extremely useful in managing the WCB claim. There are often complex medical evidence questions that have not been fully answered by the employee's treating physician or doctors acting on behalf of the board. An examination by an employer's doctor who is fully aware of the workplace can assist the WCB in coming to an appropriate decision. We are also able to identify causes of the accident that can be passed on to our Safety, Operations and Engineering people so that corrective adjustments can be made and future accidents thereby prevented. Employers are also eager to co-operate with the employee and the board in getting injured employees back to work on modified duties as quickly as possible and examination by our physician is extremely helpful in facilitating the rehabilitation and re-integration of the worker back into the workplace by ensuring the worker is given duties commensurate with his/her capabilities. Section 52 has worked well in Nova Scotia and we can see no reason for its removal. Use of Section 52 speeds the return of the worker to the workplace

> as well as facilitates a timely decision of the WCB by making available all necessary information to the Board for its consideration in reaching a fair and equitable decision on appropriate compensation. We believe employers have acted in a responsible manner in ordering medical examinations only where needed and we believe we have always retained the most qualified professionals to carry out such examinations."

The Select Committee believes that the provisions of Section 64 of the current legislation provides a useful mechanism for employer input into the claims process while not inhibiting the exercise of any rights a worker has under the Workers' Compensation Act.

Therefore, the Select Committee recommends that:

46. "The provisions of the current Workers' Compensation Act, Section 64(1) which permit an employer to require an employee to be examined by a duly qualified medical practitioner chosen and paid for by the employer, should remain in the Act. This provision should be subject to any terms and conditions in respect to such examinations found in collective agreements which are binding upon the employer and the union representing the injured worker."

Scale of Fees

A number of presentations, particularly from workers' counsellors, pinpointed the rising costs of medical opinions, particularly specialists, as one reason for the rapidly escalating costs of the workers counsellors system. The overall cost of this system is of concern to the Select Committee.

While the value of the workers counsellor system will be addressed below, it is the view of the Select Committee that some of the difficulties of cost containment could be addressed by a standardized scale of fees for opinions rendered in respect of workers' compensation claims. In that

regard, the Select Committee notes that it is not fair to equate a medical opinion rendered for use before the Workers' Compensation Appeal Board, a quasi-judicial tribunal, to a similar opinion which might be used in civil litigation. The latter opinion is likely to be subject to the pre-trial discovery process and lengthy challenge at trial. Both of those procedures are not available in appeals to the Workers' Compensation Appeal Board.

Therefore, the Select Committee recommends that:

47. "The Workers' Compensation Board should negotiate a scale of fees with the Medical Society of Nova Scotia for medical reports, including those of specialists, which are required by workers' counsellors in the discharge of their duties pursuant to the Workers' Compensation Act. Workers' counsellors should not be required, in any event, to pay more than the schedule of fees so negotiated and should not be entitled to reimbursement for costs incurred for medical reports in excess of the scale of fees mentioned herein."

Panel of Specialists

Bill 99 makes provision in Section 178 for medical advisory panels. Such panels were to be appointed on an ad hoc basis and to consist of a minimum of two and not more than five "qualified medical practitioners specialized in the area".

Any one who has had occasion to work in the area of Workers' Compensation knows that there can be lengthy delays in arranging the examination of an injured worker by one specialist. Those delays, and costs, would be compounded by having panels of up to five specialists to adjudicate, on a regular basis, on Workers' Compensation claims.

However, there may be exceptional circumstances where in contentious cases the Workers' Compensation Appeal Board may find it appropriate to have an injured worker examined by more than one specialist. It is the view of the Select Committee that such cases would be exceedingly rare and would only involve the most serious types of disabilities.

Therefore, the Select Committee recommends that:

48. "Section 178 of Bill 99 should be deleted.

The Select Committee also recommends that:

49. "The Workers' Compensation Appeal Board should, in addition to its current ability to refer injured workers to a specialist, in appropriate circumstances, have the option of referring injured workers to a panel of specialists."

PART VIII - ADJUDICATION AND APPEALS

Perhaps no portion of the proposals found in Bill 99 prompted as much comment as the proposal to change the current system of external appeals to the Workers' Compensation Appeal Board.

Nova Scotia was in the forefront of other Canadian jurisdictions in providing an external self-administered body to hear appeals from decisions of the Workers' Compensation Board. Prior to the establishment of the Workers' Compensation Appeal Board, the Workers' Compensation Board's ability to make decisions which were basically not capable of challenge had engendered much frustration.

During the time since the inception of the Workers' Compensation Appeal Board, appellants have achieved a high level of success in overturning decisions of the Workers' Compensation Board. Some suggest that this degree of success is due to the untenable nature of the decisions rendered at the Workers' Compensation Board. Others would suggest that it is indicative of difficulties lying at the Workers' Compensation Appeal Board level.

Serious concerns have arisen concerning the number of appeals, the costs thereof, and, most importantly, delays suffered by injured workers in receiving a hearing before the Workers' Compensation Appeal Board.

The MAG Report, when it considered this matter, commented at page 23:

> "The MAG found there is a basic agreement amongst all parties that there is a necessity for an external appeals process, however, there is little general agreement on the form such an external appeal process should take."

The Select Committee is in agreement with the first portion of the above statement - few, if anyone, would today challenge the desirability, and perhaps even necessity, of an external self-administered Workers' Compensation Appeal Board.

However, the Select Committee, in the submissions it received, found a very high degree of unanimity in regard to the appropriate type of external appeal system. The vast majority of those who appeared before the Select Committee recommended that the Workers' Compensation Appeal Board should be retained, essentially in its same form, in respect of its

powers and in regard to such procedural matters as its ability to receive new evidence, etc.

Employer Participation

However, employers expressed reservations concerning the Workers' Compensation Appeal Board because employer's are not allowed to appear before the Workers' Compensation Appeal Board and are not represented at the Appeal Board level.

As indicated earlier, it is the recommendation of the Select Committee that the Workers' Compensation Appeal Board become a tri-partite body, with one-third of the representatives thereof being representatives of management. It is the view of the Select Committee that this provision, together with the tri-partite nature of the Workers' Compensation Board, and the ability of employers to require independent medical examinations, provides employers with a full degree of input into the Workers' Compensation system.

There are any a number of complications which might ensue if employers were permitted to become active participants in an adversarial context at the Workers' Compensation Appeal Board level.

Delays in Adjudication

It is the view of the Select Committee that throughout the claims adjudication process there are delays which are unacceptable. Quite often these delays result from the failure of various participants in the system to supply the evidence which is required to properly adjudicate upon a claim. Often requests are made which go unanswered for some period of months.

It is the desire of the Select Committee to have the claims adjudicators of the Workers' Compensation Board become more pro-active in their requests of employers, physicians and workers for the information they require to adjudicate upon claims. Therefore, the Select Committee recommends that:

50. "A claims adjudicator should have 60 days within which to reach a decision following receipt of a claim from an injured worker. If a decision is not rendered

within 60 days, the claim should be deemed to be allowed."

Internal Review

There was much adverse comment directed to the Select Committee in respect of the proposed Review Commission, as well as the other internal appeal process contemplated by Bill 99. However, most participants were in agreement that it was appropriate that there should be an internal level of appeal within the Workers' Compensation Board from the initial decisions of the claims adjudicators. Moreover, it was deemed to be essential that this level of appeal should be compulsory for claimants so as to prevent the Workers' Compensation Appeal Board from being overwhelmed by appeals and to provide the Workers' Compensation Board itself the opportunity to police the initial level of claims adjudication.

As recommended above, the Select Committee believes that the change of the Workers' Compensation Board to a tri-partite body will enable it to have the effective input of all the stakeholders in the system. Prior to receiving that input, the Select Committee believes that it would be inappropriate to recommend a particular form of internal appeal which would be appropriate for the newly constituted Workers' Compensation Board.

Therefore, the Select Committee recommends that:

51. "There should be a second level of adjudication, internal to the Workers' Compensation Board. Appeals should be made from adjudicators to this internal appeal level. The internal appeal level must make a decision in respect of an appeal within 15 working days. If a decision is not made within that time frame, then the appeal should be deemed to be allowed and the worker should receive the benefits which he has claimed.

52. The tri-partite Board of Commissioners Worker Compensation should determine the appropriate structure for an internal appeal system."

Workers' Compensation Appeal Board

As indicated previously, one of the more serious criticisms levelled at the Workers' Compensation Appeal Board concerned delays in rendering decisions. This delay has two components. It takes a period of some months to have an appeal heard before the Workers' Compensation Appeal Board. Thereafter, it sometimes takes a considerable period of time for the Workers' Compensation Appeal Board to render its decision.

The Select Committee believes that both of these delays are inappropriate. Therefore, the Select Committee recommends that:

53. "The Workers' Compensation Appeal Board should be the final level of appeal. The Workers' Compensation Appeal Board should render a decision within 60 days of the hearing of the appeal. If upon hearing the appeal the Workers' Compensation Appeal Board determines that additional medical evidence is required, it should render its decision within 60 days of the receipt of such additional medical information."

The Select Committee believes that the consequences of failure to render timely decisions should be the same for the Workers' Compensation Appeal Board as it is for the Workers' Compensation Board. Therefore, the Select Committee recommends:

54. "Failure of the Workers' Compensation Appeal Board to render a decision within the time frame stipulated should result in the appeal being deemed to have been allowed."

Injured workers do not have the resources to travel great distances to have their cases heard before the Workers' Compensation Appeal Board. It has, in the past, been the practice of the Workers' Compensation Appeal Board to travel to various areas of Nova Scotia to hear appeals. The Select Committee believes that this practice should be continued and expanded and therefore recommends that:

55. "The Workers' Compensation Appeal Board, or panels thereof, may sit anywhere within the province of Nova Scotia."

As recommended previously, the Select Committee has suggested that the Workers' Compensation Appeal Board consist of nine members. In order the expedite the hearing of appeals, the Select Committee recommends that:

56. "The Workers' Compensation Appeal Board should sit in panels of three, each panel consisting of a representative of labour, a representative of management, and an independent chairperson or vice-chairperson."

Currently, the right of appeal of decisions of the Workers' Compensation Board to the Workers' Compensation Appeal Board is limited, roughly speaking, to "medical questions". For example, the question of whether an accident has or has not occurred on the job is currently determined by the Workers' Compensation Board without a right of appeal to the Workers' Compensation Appeal Board.

It is the view of the Select Committee that given the newly constituted nature of the Workers' Compensation Appeal Board, it should become an appeal board in the fullest sense of that term. Therefore, the Select Committee recommends that:

57. "There should be a full right of appeal to the Workers' Compensation Appeal Board from all decisions of the Workers' Compensation Board. Specifically, there will be a right of appeal to the Workers' Compensation Appeal Board from decisions of the Workers' Compensation Board that an accident has or has not occurred on the job.

58. Employers should be entitled to 'standing' before the Workers' Compensation Appeal Board in respect to appeals dealing with whether or not an injury has occurred on the job but not in respect of any other matter dealing with a worker's claim to entitlement."

Employer Assessments

Previously in this report, recommendations have been made aimed at meeting some of the criticisms employers have expressed concerning the level of their assessment.

Employers currently encounter the difficulty of being unable to have an independent decision-making body adjudicate upon any disputes they might have with the Workers' Compensation Board in respect of their rate of assessment.

It is the view of the Select Committee that employers have a right, in a matter as important as rate assessment under the Workers' Compensation Act, to be able to seek redress outside of the Workers' Compensation Board in regard to any disputes concerning such assessments.

Therefore, the Select Committee recommends that:

59. "Employers should have the right to appeal the rate of their assessment and the category of industry in which they have been placed by the Workers' Compensation Board to the Workers' Compensation Appeal Board. For the purposes of employer appeals of assessment, the Workers' Compensation Appeal Board should consist of the Chairperson and two Vice-Chairpersons."

Workers' Compensation Appeal Board Decisions

There have been significant adverse judicial comments on the nature of the decisions rendered by the Workers' Compensation Appeal Board. As well, the decisions of the Workers' Compensation Appeal Board are not "public" so that the various participants in the Workers' Compensation system are not able to determine the basis upon which the Workers' Compensation Appeal Board has rendered its decisions. Therefore, the Select Committee recommends that:

60. "The Workers' Compensation Appeal Board should render decisions in writing which should be available to the public. The decisions should be written in such a manner so as not to disclose confidential

medical information concerning the injured worker."

New Evidence

Bill 99 introduced a significant change in the current practice before the Workers' Compensation Appeal Board. Bill 99 contemplates an appeal system whereby any new evidence is tendered to the initial level of claims adjudication. Hence, if an injured worker was awaiting an appeal, but during that time obtained a new medical report helpful to his/her case, he/she would be faced with the choice of proceeding to his/her appeal without the ability of tendering that evidence or beginning the process again at the initial level of claims adjudication.

The Select Committee received representations that new evidence should be introduced at the initial claims adjudication level because the high degree of success at the Workers' Compensation Appeal Board level is largely dependent upon new evidence which the Workers' Compensation Board had not had the opportunity to review.

This debate misses the point. The question is not which level of adjudication can more appropriately deal with "new evidence". The issue is the provision of benefits, on a timely basis, to deserving injured workers.

Therefore, it is the recommendation of the Select Committee that:

61. "The Workers' Compensation Appeal Board should be entitled to hear new evidence introduced for the first time before the Appeal Board."

The Select Committee agrees that it is not appropriate that the internal structure of appeals is by-passed on a regular basis. Participants in the system have indicated that this occurs because, in their view, the internal appeal system is not receptive to overturning the initial decisions of the claims adjudicators.

As indicated previously, the exact form which the internal Workers' Compensation Board appeal process will take is best left to the newly constituted Board of Commissioners of Workers' Compensation. This internal appeal system will have an opportunity to "prove itself" as appeals from claims

adjudicators to the internal appeal level of the Workers' Compensation Board are compulsory.

However, in order to allow workers and their representatives the maximum degree of flexibility in achieving a timely resolution of workers complaints, the Select Committee recommends that:

62. "An injured worker should have, at his/her option, the right to tender new evidence to either the adjudicator, the internal level appeal of the Workers' Compensation Board, or the Workers' Compensation Appeal Board."

Section 152

Section 152(1) of Bill 99 states:

> "152 (1) In the hearing of appeals pursuant to this Act, the Appeal Board is bound by policy determined by the Commissioners that relates to the matter under appeal, and where the Commissioners consider that the Appeal Board has not properly applied that policy or the provisions of this Act and the regulations that are applicable to the matter under appeal, the Commissioners may in writing direct the Appeal Board to rehear the matter and to give fair and reasonable consideration to that policy or those provisions."

Concern was expressed by certain of those who appeared before the Select Committee that the Workers' Compensation Appeal Board, through its decisions, had had the effect of amending the Workers' Compensation legislation or had rendered decisions directly counter to the policy of the Workers' Compensation Board.

It is trite to state that the Workers' Compensation Board and the Workers' Compensation Appeal Board are both bound by the Workers' Compensation Act and the Regulations thereunder. Any "policies" of the Workers' Compensation Board must be in

accordance with the legislation and regulations in order to be valid.

It is the view of the Select Committee that it would be totally inappropriate to have an independent self-administered appeal tribunal bound by the "policy" of an "inferior" tribunal. Policies of the Workers' Compensation Board must be able to stand the scrutiny of the Workers' Compensation Appeal Board as to whether they are in accordance with the Workers' Compensation Act and its regulations.

It is even more inappropriate, in the Select Committee's view, that the Workers' Compensation Board could direct the Workers' Compensation Appeal Board to re-hear a matter if, in the Workers' Compensation Board's opinion, its policies have not been adhered to.

Therefore, the Select Committee recommends that:

63. "Section 152 of Bill 99 should be deleted."

If the Workers' Compensation Appeal Board is to be effective, it must be able to render final and binding decisions. Therefore, the Select Committee believes to be inappropriate the provisions of Bill 99 found in Section 145(4):

> "The Board, notwithstanding subsection (3), may on new facts amend or rescind the decision made pursuant to this Act by the Appeal Board."

Therefore, the Select Committee recommends that:

64. "Section 145(4) of Bill 99 should be deleted."

PART IX - WORKERS' REPRESENTATIVES

Workers' Counsellors

Most of those who appeared before the Select Committee were highly supportive of the efforts made on their behalf by workers' counsellors appointed pursuant to the Act. A number of workers' counsellors took the opportunity of appearing before the Select Committee.

The costs of the workers' counsellors system is a concern. However, it is the view of the Select Committee that the alternative system proposed in Bill 99, of workers' advocates, would not, in the end result, be any more cost efficient than the workers' counsellors system and would not provide the same level of service as currently provided by workers' counsellors.

The Select Committee has a serious concern in respect of the perceived independence of workers' advocates who would work directly for an adjunct of the Workers' Compensation Board.

The Select Committee heard concerns expressed in respect of the method of appointment of workers' counsellors. In particular, there was concern in regard to the uneven availability of this service throughout the province.

It is the view of the Select Committee that the workers' counsellors system, while expensive, provides a needed service to injured workers. However, improvements can be made in regard to the availability of this service.

Therefore, the Select Committee recommends that:

65. "The workers' counsellors program should be continued and expanded. Injured workers should be able to choose any member of the Nova Scotia Barristers' Society, currently in good standing, to assist in the handling of their claim for compensation benefits. The scheme of payment for workers' counsellors should not be changed."

Workers' Advocates

The Select Committee's views in regard to workers' advocates are set forth above. An expanded system of workers' counsellors would remove the necessity for workers' advocates.

Therefore, the Select Committee recommends that:

66. "Section 176 of Bill 99 should be deleted."

PART X - PUBLIC EDUCATION

The Select Committee is of the view that many of the complaints concerning the administration of the Workers' Compensation system flow directly from a failure of many of the participants therein to properly understand both the nature of workers' compensation and, more importantly, the particular procedures required to be followed in order to establish a claim for benefits.

In other areas, particularly social services, detailed information pamphlets have been developed to allow claimants to understand the system and to expeditiously process claims for benefits. The Select Committee is strongly of the view that a similar effort by the Workers' Compensation Board would be beneficial.

Therefore, the Select Committee recommends that:

67. "A pamphlet should be developed, for distribution by the Workers' Compensation Board, which in simple language, on a step-by-step basis, provides information to injured workers as to all of the requirements which must be met for the filing of a claim. The pamphlet should begin with the initial filing of the Report of Accident and should end with information concerning the Workers' Compensation Appeal Board, as well as covering all steps in between. This pamphlet should be printed by the Workers' Compensation Board and distributed to every employer who pays assessments under the Workers' Compensation Act."

Information is only effective if it is conveyed to those who require it. In order to ensure that injured workers are aware of their rights, a Select Committee recommends that:

68. "The Workers' Compensation Act should include a provision that it is mandatory for the employer to provide the information pamphlets supplied by the Workers' Compensation Board to injured workers at the same time as they are provided with the Report of Accident form."

A number of individuals who appeared before the Select Committee commented upon the difficulty in obtaining information concerning current policies of the Workers' Compensation Board. Quite often claims may be denied on the basis of a particular policy, but the details thereof are not able to be ascertained by injured workers or their representatives.

It is the view of the Select Committee that the Workers' Compensation Board should, and must, operate in as open an environment as possible. If its claims adjudication procedures are governed by policies, those policies should be known by all of those who participate in the system. Therefore, the Select Committee recommends that:

69. "The Workers' Compensation Board policy manual and regulations should be printed and placed in the government book store for purchase. The purchase price should be the cost of production. Both the policy manual and regulations should be updated and republished annually."

PART XI - OCCUPATIONAL HEALTH AND SAFETY

At the time of the introduction of the Occupational Health and Safety Act, R.S.N.S. 1989, c. 320, the various "safety related" aspects of different departments and agencies of government were gathered together and placed under the jurisdiction of the Department of Labour. The Select Committee heard a number of criticisms of this arrangement. In particular, there was concern that this division which was responsible for workplace safety did not have available to it all of the necessary statistical information which would be in the hands of the Workers' Compensation Board. Moreover, there was a sentiment that it was not appropriate to have the safety aspect of the work place separate and apart from the Workers' Compensation Board which was required to directly levy assessments on employers. This arrangement is, in the view of the Select Committee, even more inappropriate, given the proposals for a merit or experience rating system of assessments.

Therefore, the Select Committee recommends that:

70. "The Accident Prevention Division of the Occupational Health and Safety division of the Department of Labour should be transferred to the Workers' Compensation Board and should report to the Board of Commissioners of the Workers' Compensation."

PART XII - LEGISLATIVE SUPERVISION OF THE WORKERS' COMPENSATION BOARD

Bill 99 contemplated in Section 174 that the Minister of Labour would establish a Workers' Compensation Advisory Panel to review the Act and the operation of the Workers' Compensation Board and to report and make recommendations to the Minister of Labour.

As previously indicated, the Workers' Compensation Act and, in particular, the functioning of the Workers' Compensation Board has been the subject, over the years, of much legislative scrutiny. It is the view of the Select Committee that the most appropriate forum for the continuing review of the effectiveness of the Workers' Compensation process is provided by those representatives elected by the people of Nova Scotia.

While Workers' Compensation is independent from government, the elected representatives of the people should, and in the view of the Select Committee, must, have the opportunity to directly question those who are administering the Workers' Compensation system in the province.

Therefore, the Select Committee recommends that:

71. "Section 174 of Bill 99 should be deleted."

72. The Workers' Compensation Board should be required, at least annually, to report to the Standing Committee of the House of Assembly on Human Resources and, at the Committee's discretion, to appear before that committee."

PART XIII - COSTING OF RECOMMENDATIONS

One of the most consistent, and most serious, criticisms of Bill 99 was the inability to "cost" any of the recommendations contained therein. The view of many was that it would be inappropriate to make extensive changes to the current system of Workers' Compensation without being able to adequately address the question of the costs of those proposals.

Therefore, the Select Committee recommends that:

73. "Any recommendation of this Select Committee which results in new legislation should be costed prior to the proclamation of that legislation."

PART XIV - SUMMARY

If there is one theme which is consistent throughout the above recommendations, it is the view of the Select Committee that every effort must be made to put as much control of the Workers' Compensation system as is possible in the hands of the "stakeholders" - employers and their injured workers.

Of particular importance to any success which the above recommendations might have is the tri-partite nature of the Workers' Compensation Board and the Workers' Compensation Appeal Board. Without "stakeholder input" at the Workers' Compensation Board and Workers' Compensation Appeal Board level, the various other recommendations suggested herein are not likely to bring about the changes which the Select Committee believes are necessary in the system of Workers' Compensation in Nova Scotia.

The above recommendations represent the consensus of the Select Committee. Not all of the recommendations contained herein were unanimously accepted by all members of the Committee.

Once again, our thanks for all of those who assisted the Select Committee in its deliberations.

All of which is respectfully submitted to the members of the House for their consideration this 27th day of January, 1991.

Mr. Leroy Legere, MLA
Chairman

Honourable Ronald Giffin

Honourable Kenneth Streatch

Mrs. Marie Dechman, MLA

Mr. Al Mosher, MLA

Mr. Guy Brown, MLA

Ms. Sandra Jolly, MLA

Mr. Paul MacEwan, MLA

Mr. John Holm, MLA

LIST OF RECOMMENDATIONS

1. "The Workers' Compensation Board should be 'tri-partite' and composed of nine members, appointed by the Governor in Council, as follows:

   (a) a full-time, independent, chief commissioner;

   (b) four part-time board members nominated by appropriate groups representing organized labour;

   (c) four part-time board members nominated by appropriate groups representing employers covered by the Workers' Compensation Act."

2. "The nine members of the Workers' Compensation Board should have staggered appointments, with three members having initial terms of one year, three members having initial terms of two years, and three members, including the chief commissioner, having initial terms of three years. Members should be eligible for reappointment upon the expiry of their terms and subsequent terms should be of three years duration."

3. "Efforts should be made to ensure the members of the Workers' Compensation Board reflect both regional representation and appropriate gender representation."

4. "Efforts should be made to ensure the members of the Board include at least one representative of 'small business'. In addition, at least one representative of organized labour should represent workers in the coal mining industry, preferably by way of representation from the United Mine Workers of America."

5. "The [illegible] of the Board of Commissioners of Workers Compensation should be one of

policy formulation rather than claims adjudication."

6. "The Workers' Compensation Appeal Board should be a tri-partite body.

The Workers' Compensation Appeal Board should consist of nine individuals as follows:

(a) one full-time chairperson;

(b) two part-time vice-chairpersons;

(c) three representatives of labour, nominated by appropriate groups representing organized labour;

(d) three representatives of management nominated by appropriate groups representing employers covered by the Workers' Compensation Act.

7. The members of the Workers' Compensation Appeal Board should be appointed by the Governor in Council."

8. "The members of the Workers' Compensation Appeal Board should initially be appointed for staggered terms of one, two and three years. The chairperson and vice-chairpersons should be appointed for initial terms of three years. All members should be eligible for reappointment and upon reappointment the term of office should be of three years duration."

9. "The Chairperson and Vice-Chairpersons of the Workers' Compensation Appeal Board should be independent appointees not representing either labour or management."

10. "The coverage of the Workers' Compensation Act should be universal for employers employing more than two workers except where the Board determines otherwise."

11. "The Workers' Compensation Board should examine each of the industries which will be included under the Workers' Compensation Act through universal assessment to determine whether they currently provide a level of benefits equal to or superior to that which will be provided to employees under the Workers' Compensation Act. The decision of the Workers' Compensation Board as to whether such industries should be included under the provisions of the Act may be appealed to the Workers' Compensation Appeal Board."

12. "Employers should be billed on a quarterly basis for their assessments under the Workers' Compensation Act."

13. "A merit rating system for employers should be implemented. This system should review the previous two years experience of the employer. If there has been a decrease in the occurrance of accidents for the employer during that time frame, this decrease should be reflected by a decrease in that employer's assessment."

14. "There should be an increase in the number of categories of employer assessment, modeled upon the current Ontario system, resulting in the addition of additional categories of assessment."

15. "Rehabilitation is the right of every injured worker and should not be a discretionary benefit which may be conferred upon injured workers by the Workers' Compensation Board. The Workers' Compensation Act should be amended to state:

> 'Rehabilitation services should be provided, upon receipt of an appropriate

medical specialists recommendation, to any injured worker who has been continuously disabled from work for a period in excess of 60 days.'"

16. "The Board should establish a special fund for the provision of rehabilitation services. The fund should be used exclusively for rehabilitation services as provided for under the provisions of the Workers' Compensation Act."

17. "Where, in the opinion of the Board, the worker does not fulfill the workers' duties or obligations pursuant to the agreement referred to in subsection 1, the Board may terminate or suspend compensation payments to the worker after consultation between the worker and their relevant rehabilitation counsellor."

18. "The definition of injury found in Section 2(1)(j) of Bill 99 should remain unchanged."

19. "Bill 99 should be amended to state that it will not be necessary for an injured worker, who suffers from industrial disease, including hearing loss, to demonstrate an actual loss of earnings in order to be compensated for permanent medical impairment arising from the industrial injury."

20. "The definition of industrial disease found in section 2(s) of Bill 99 should not be changed."

21. "The definition of pre-injury earnings should be amended to consider a workers net earnings from all employment in the period 24 months immediately preceding the commencement of loss of earnings as a result of the injury and all unemployment insurance benefits, divided by the total number of weeks during the 24 month period

the worker receives either earnings or unemployment insurance benefits, times 0.90."

22. "Bill 99 should be amended to clearly indicate that 'topping up' benefits received by an injured worker from his employer under a collective agreement, as well as any similar benefits an employee might receive through private plans paid for by the worker, will not be included in the definition of post injury earnings found in section 2(1)(t)."

23. "Section 2(1)(y)(xiv) of Bill 99 should be deleted and replaced with the current wording in respect to casual workers found in the Workers' Compensation Act, Section 4(2)(a)."

24. "The level of benefits provided in the case of the death of worker should remain at the levels currently in force."

25. "The current level of benefits for workers on permanent total disability and their dependents should be continued."

26. "The current maximum level of earnings of $36,000 per annum should remain in place subject to adjustments from time to time as required."

27. "Older worker benefits found in section 40 of Bill 99 should be amended to indicate that the benefits provided to older workers should only apply in cases where such workers are required to leave the workforce due to injury rather than voluntary retirement."

28. "Provisions found in the current legislation concerning minimum levels of compensation and the indexing of the benefits should be continued"

29. "Workers' Compensation Benefits should be indexed to the increase in the average industrial wage of the Province of Nova Scotia rather than the Consumer Price Index for the Province of Nova Scotia."

30. "Section 42(2) of Bill 99 should be deleted."

31. "Section 14(1) of Bill 99 should be amended so that a worker or a worker's dependant has six months from the date of injury to give notice to the Board that they intend to commence a legal action."

32. "A worker must give notification of injury, other than industrial disease, to his/her employer as soon as possible after the injury is sustained and before the worker has voluntarily left the employment in which the worker was injured.

33. In the case of an industrial disease, the worker must give notice of injury to his/her employer within six months from the date the worker is diagnosed as having an industrial disease.

34. Dependants of an injured worker must give notice of injury in respect of either a work injury or an industrial disease to the deceased worker's employer within six months from the date of death."

35. "Any worker who is in receipt of temporary total disability benefits for a period in excess of one month should receive a minimum of two weeks' written notice prior to the termination of benefits. The notice of termination of benefits should be included with the cheque forwarded to the worker in respect of compensation benefits."

36. "If an injured worker has been in receipt of temporary total disability benefits on a continuous basis for twelve months or more, those benefits should not be discontinued without examination by an independent medical specialist."

37. "Section 24(1) of Bill 99 should be reworded to provide that any worker who persists in actions which might impair his/her recovery or refuses to submit to reasonably essential medical treatment may have his/her benefits reduced or suspended"

38. "A worker who suffers permanent medical impairment as a result of an injury should receive a lump-sum payment in respect of the physical impairment which he/she has suffered."

39. "In determining an employee's future loss of earnings, the Workers' Compensation Board or the Workers' Compensation Appeal Board should consider the following factors, which list is not exclusive:

(a) age

(b) occupational history

(c) experience

(d) skills

(e) education

(f) language

(g) labour market conditions as they relate to the individual's particular needs, abilities and circumstances

(h) rehabilitation potential.

The purpose of the review of these factors is to ensure that a worker's actual loss of earnings from the injury is compensated."

40. "There should be a periodic review of permanent partial disability awards to determine whether a worker's permanent partial disability has changed."

41. "Section 36(3) of Bill 99 should be amended by the deletion of the word 'significant' found in the second line thereof."

42. "The current provisions of the Workers' Compensation Act, Section 9(2), concerning pre-existing conditions, should not be changed. If the impact of Section 5(3) of Bill 99 is to change the current situation in respect to pre-existing conditions, this should not occur and Bill 99 should be amended to reflect provisions currently found in Section 9(2) of the Workers' Compensation Act."

43. "The current provisions of the Workers' Compensation Act in respect to recurrences should remain unchanged."

44. "It appears that the Bill 99 does not contain a 'privative clause' protecting decisions of the Workers' Compensation Board from review by the courts in respect of errors other than errors of law or errors going to jurisdiction. The new legislation should contain such a privative clause."

45. "The Workers' Compensation Act should be amended to prohibit any participation in the claims adjudication process by physicians permanently employed by the Workers' Compensation Board. The role of these physicians should be limited to one

of being a medical advisor to the Board and more specifically the role of the physicians employed by the Workers' Compensation Board should be:

(a) to provide advice on medical matters and assisting staff in decision making;

(b) the doctor should not become involved directly in claims adjudication;

(c) the doctor should not become involved in file management;

(d) the doctor should be limited to describing the medical condition only;

(e) the doctor should assist in interpreting medical reports for other staff."

46. "The provisions of the current Workers' Compensation Act, Section 64(1) which permit an employer to require an employee to be examined by a duly qualified medical practitioner chosen and paid for by the employer, should remain in the Act. This provision should be subject to any terms and conditions in respect to such examinations found in collective agreements which are binding upon the employer and the union representing the injured worker."

47. "The Workers' Compensation Board should negotiate a scale of fees with the Medical Society of Nova Scotia for medical reports, including those of specialists, which are required by workers' counsellors in the discharge of their duties pursuant to the Workers' Compensation Act. Workers' counsellors should not be required, in any event, to pay more than the schedule of fees so negotiated and should not be entitled to reimbursement for costs incurred for medical reports in excess of the scale of fees mentioned herein."

48. "Section 178 of Bill 99 should be deleted.

49. "The Workers' Compensation Appeal Board should, in addition to its current ability to refer injured workers to a specialist, in appropriate circumstances, have the option of referring injured workers to a panel of specialists."

50. "A claims adjudicator should have 60 days within which to reach a decision following receipt of a claim from an injured worker. If a decision is not rendered within 60 days, the claim should be deemed to be allowed."

51. "There should be a second level of adjudication, internal to the Workers' Compensation Board. Appeals should be made from adjudicators to this internal appeal level. The internal appeal level must make a decision in respect of an appeal within 15 working days. If a decision is not made within that time frame, then the appeal should be deemed to be allowed and the worker will receive the benefits which he has claimed.

52. The tri-partite Board of Commissioners Worker Compensation should determine the appropriate structure for an internal appeal system."

53. "The Workers' Compensation Appeal Board should be the final level of appeal. The Workers' Compensation Appeal Board should render a decision within 60 days of the hearing of the appeal. If upon hearing the appeal the Workers' Compensation Appeal Board determines that additional medical evidence is required, it should render its decision within 60 days of the receipt of such additional medical information."

54. "Failure of the Workers' Compensation Appeal Board to render a decision within the time frame stipulated should result in the appeal being deemed to have been allowed."

55. "The Workers' Compensation Appeal Board, or panels thereof, may sit anywhere within the province of Nova Scotia."

56. "The Workers' Compensation Appeal Board should sit in panels of three, each panel consisting of a representative of labour, a representative of management, and an independent chairperson or vice-chairperson."

57. "There should be a full right of appeal to the Workers' Compensation Appeal Board from all decisions of the Workers' Compensation Board. Specifically, there will be a right of appeal to the Workers' Compensation Appeal Board from decisions of the Workers' Compensation Board that an accident has or has not occurred on the job.

58. Employers should be entitled to 'standing' before the Workers' Compensation Appeal Board in respect to appeals dealing with whether or not an injury has occurred on the job but not in respect of any other matter dealing with a worker's claim to entitlement."

59. "Employers should have the right to appeal the rate of their assessment and the category of industry in which they have been placed by the Workers' Compensation Board to the Workers' Compensation Appeal Board. For the purposes of employer appeals of assessment, the Workers' Compensation Appeal Board should consist of the Chairperson and two Vice-Chairpersons."

60. "The Workers' Compensation Appeal Board should render decisions in writing which should be available to the public. The decisions should be written in such a manner so as not to disclose confidential medical information concerning the injured worker."

61. "The Workers' Compensation Appeal Board should be entitled to hear new evidence introduced for the first time before the Appeal Board."

62. "An injured worker should have, at his/her option, the right to tender new evidence to either the adjudicator, the internal level appeal of the Workers' Compensation Board, or the Workers' Compensation Appeal Board."

63. "Section 152 of Bill 99 should be deleted."

64. "Section 145(4) of Bill 99 should be deleted."

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66. "Section 176 of Bill 99 should be deleted."

67. "A pamphlet should be developed, for distribution by the Workers' Compensation Board, which in simple language, on a step-by-step basis, provides information to injured workers as to all of the requirements which must be met for the filing of a claim. The pamphlet should begin with the initial filing of the Report of Accident and should end with information concerning the Workers' Compensation Appeal Board, as well as covering all steps in between. This pamphlet should be printed by the Workers' Compensation Board and distributed to every employer who pays assessments under the Workers' Compensation Act."

68. "The Workers' Compensation Act should include a provision that it is mandatory for the employer to provide the information pamphlets supplied by the Workers' Compensation Board to injured workers at the same time as they are provided with the Report of Accident form."

69. "The Workers' Compensation Board policy manual and regulations should be printed and placed in the government book store for purchase. The purchase price should be the cost of production. Both the policy manual and regulations should be updated and republished annually."

70. "The Accident Prevention Division of the Occupational Health and Safety division of the Department of Labour should be transferred to the Workers' Compensation Board and should report to the Board of Commissioners of the Workers' Compensation."

71. "Section 174 of Bill 99 should be deleted."

72. The Workers Compensation Board should be required, at least annually, to report to the Standing Committee of the House of Assembly on Human Resources and, at the

Committee's discretion, to appear before that committee."

73. "Any recommendation of this Select Committee which results in new legislation should be costed prior to the proclamation of that legislation."

Appendix "A"

Members of the Committee acknowledge their gratitude to those who appeared at public hearings and to those who provided written submissions. We thank

Yarmouth Public Hearings

Mrs. Irene d'Entremont
Chairperson, Nova Scotia Chamber of Commerce

Ms. Laurie Hitchens
Temporary Representative, Canadian Union of Public Employees

Mr. Thomas Ernst, Secretary-Advisor,
Christmas Tree Council of Nova Scotia

Ms. Joyce Baxter
President, Local 16,
Nova Scotia Government Union

Ms. Heather Burlingham
President, Yarmouth Tri-County District Labour Council

Ms. Brenda Mosher
President, South West Nova C.U.P.E. Councils

Mr. Mark Dempsey
Workers' Counsellor
(Lunenburg, Queens and Shelburne)

Mr. Curt Palmer
Workers' Counsellor
(Hants, Kings, Annapolis and Digby)

Dr. Charles Daniels
Chiropractor, Hebron, N. S.

Mr. Ken Black
Rio Kemptville Tin Company

Sydney Public Hearings

Mr. Gerald Yetman
National Representative, C.U.P.E.

Mr. Ronald MacSween
Private Citizen

Mr. Hughy MacArthur, President
Cape Breton Injured Workers Group

Mr. Gerald O'Neill
C.U.P.E., Local 2046

Mr. Brian Matheson, Business Manager and
Mr. Neil MacDonald, President of Local 1928
International Brotherhood of Electrical Workers

Mr. Mike MacDonald
International Brotherhood of Electrical Workers

Mr. Tom Fiander and Ms. Jennifer MacDonald representing
Cape Breton Island Builders' Exchange

Dr. John Stevens, M. D.
Vice President
New Democratic Party of Nova Scotia

Mrs. Wendy MacKenzie
Coordinator, Patient Rights Advocacy Network

Mr. Harvey LeBlanc, President
Cape Breton and District Labour Council and
Mr. Everett Baker, Representative
Canadian Labour Congress

Mr. Cal Luedee
United Steelworkers of America

Mr. Wally Power
Canadian Labour Workers Union
Causeway Local 972

Halifax Public Hearings

Mr. John Ward, Executive Director
Atlantic Building Supply Dealer's Association

Mr. Dale Patterson, National Staff Representative and
Mr. Jim Gill, Representative Health and Safety Education
National Automobile, Aerospace and Agriculture
Implement Workers' Union of Canada

Ms. Sherry Porter, Regional Director,
Canadian Council of Grocery Distributors accompanied by representatives
of the Council

Mr. Fred Furlong
Canadian Union of Postal Workers

Mr. Robert Wells, Health and Safety Representative
Canadian Union of Public Employees

Mr. David Mahoney
Workers' Counsellor, Halifax

Mr. R. J. Morrison, Assistant Executive Director and
Mr. W. Ronald MacPherson
Nova Scotia Teachers' Union

Mr. Joachim Rohrschneider, Chairman
Local 361, Workers' Compensation Committee
United Food and Commercial Workers
(Brewery and Soft Drink Workers) and representatives of this Union

Dr. Roger Rickwood, Co-Chairman and representative of
Federal Employers Transportation and Communications Organization (FETCO,
Ottawa, Canada)

Mr. Gerald Blom, Chairman of the Board, accompanied by Mr. Jack Rowe,
President
Construction Association of Nova Scotia

Mr. Don Summers, Chairman
Ad Hoc Industry Committee on Workers' Compensation

Ms. Claudette Terrio, Executive Director,
and representatives of
Nova Scotia Forest Products Association

Mr. David Barrett
Barrett Lumber Company Limited

Mr. Peter O'Brien, Executive Director
Canadian Federation of Independent Business

Mr. Bob Burchell
United Mine Workers of America

Mr. Bryan Mason and members of C.O.N.S.U.P.
Council of Nova Scotia University Presidents

Mr. Bruce Rand and representatives of the
Nova Scotia Federation of Agriculture

Mr. Ed MacDonald
Nova Scotia Division of Canadian Manufacturers Association and members
of the Association

Mr. Allan Shaw, Chairman
Voluntary Planning Board

Mr. Wayne Ramsay, President
Injured Employees of Nova Scotia and members of the Association

Mr. Jay Lugar
Seafood Producers of Nova Scotia and members of the Association

Mr. Gerald Bowles, President
South Shore Labour Council

Mr. Les Holloway
Marine Workers' Federation and members of the Federation

Mr. David Armstrong, Director
Chamber of Mineral Resources of Nova Scotia and members of the Chamber

Mr. Malcolm Williams, Managing Director and
Mr. Aubrey Martell, Presdient
Nova Scotia Road Builders Association

Mr. Wesley MacLean
Halifax and District Injured Workers Association

Mr. Rick Clarke, President
Nova Scotia Federation of Labour and members of the Federation

Mr. Harry How
Private Citizen

Ms. Sally Sulton and Ms. Mary Lou L'Oiseau
Valley Physiotherapy Clinic

Ms. Debbie Ryan and representatives of the
Nova Scotia Government Employees Union

Ms. Betty Jean Sutherland
President, C.U.P.E., Local 2330
Westville, N. S.

Dr. Gerald Reardon, Dr. Richard Gibson and Mr. Howard Epstein
Medical Society of Nova Scotia

Mr. Reg Allen and Officials of the
Workers' Compensation Board of Nova Scotia

Mr. Keith Crocker and
Mr. Gordon MacLean representing
DEVCO

Chris Dickey, Workers' Counsellor
Jane McClure, Workers' Counsellor
Linda Zambolin, Workers' Counsellors
representing Halifax County

Ms. Marion Ferguson
Chief Workers' Counsellor

Appendix "B"

We are also grateful for letters and written submissions commenting on matters of interest to us from

The Canadian Federation of Independent Grocers,
Don Mills, Ontario

Mr. Gerard Walsh
Insurance Bureau of Canada
Halifax, N. S.

The Canadian Labour Congress
Sydney, N. S.

Mr. Harvey L. Morrison
McInnes, Cooper and Robinson
Halifax, N. S.

APPENDIX "C" - REPORT TO THE HOUSE OF ASSEMBLY OF THE SELECT COMMITTEE ON WORKERS' COMPENSATION - May, 1981

I HISTORICAL BACKGROUND

The common law system which existed in Canada at the start of the twentieth century was substantially similar to the system existing in Great Britain. The onset of the industrial revolution had occurred so rapidly that the evolvement of the law had not been able to keep pace. Laws designed for a largely rural environment could not function efficiently in what was becoming an industrialized urban atmosphere.

Common Law required centuries to evolve and was therefore not adaptable enough to deal with the swiftly changing conditions of the industrial society; workers' protection had then to be provided by statute law, in effect the replacement of general principles by specific legislation.

This is illustrated by the fact that production methods of the time and small concern for workers safety, resulted in a significant number of injuries. The injured workman was without pay and unable to work because of his injury. His only recourse was the court system of the day and the vagaries of the common law which were devised to protect the squire rather than the vassal.

Under common law and the legal system prevailing before statutory intervention, liability depended on success under tort law which essentially required a blameless victim and an employer who was negligent. During the eighteenth century the principle of vacarious liability developed which held an employer to be liable for any acts done by negligent servants while acting in their employment. This doctrine was such that accidents could be caused by one careless employee and even when the injuries were widespread to many workers, the employer could be held liable although not personally at fault. Economic ruin became a haunting possibility

for many employers. These circumstances caused consternation among certain segments of society and may have influenced the Courts to develop an exception to such vicarious liability. The exception was judicially created to exclude a master's responsibility for injuries to a servant caused by another servant on the basis that they were part of a common enterprize.

Should the defence of common employment not be a bar to the action there were further defences available on the basis of contributory negligence; voluntary assumption of risk; and negligence of third parties. To effect a successful recovery, a workman was forced to enter into a recovery process which more often than not was lengthy, expensive, and fraught with risk.

As noted, not all the risk was that of the employee and the industrial employer was faced with problems in the ensuing litigation. They had to pay, if unsuccessful, the damage award to the worker and in addition in most cases faced high insurance premiums and/or substantial legal costs. An additional factor was the industrial disruption and loss of employee morale which resulted from the adversary system. The social outcry forced the governments of the day to seek a solution.

The avenues open to governments were summarized by Chief Justice Alexander H. McKinnon, Commissioner of Inquiry in his 1958 report on the Nova Scotia system.

> "Workmen's Compensation Acts were born of necessity. Several avenues were available to a society faced with growing numbers of disabled workmen.
>
> Society could do nothing. Conceivably this course would in many cases leave the workman without food. He would have no choice but to starve.

Society could provide 'relief'. This has always been interpreted as direct contributions of money or food, or both. This plan would be more satisfactory than the first. At least the workman would not starve to death. He and his family might be branded as paupers. Nothing would be done to assist his return to work. And all the while it would cost the community substantial sums of money.

The third choice was to grant Workmen's Compensation. For the workman this was an assurance that if he was injured he would receive, as a right, sums of money determined by a fixed scale and set to provide him enough financial assistance to obtain staples for his family and himself during those days that his normal earning capacity was reduced.

To award Workmen's Compensation is not to grant relief or direct aid. No social stigma is attached to the injured workman or his family. It is not designed to permit him to make a profit but it is designed to preserve his dignity and self-respect. The price is paid ostensibly by industry but it is in fact passed on to the consumer. And so it should be. If consumers want the product then they must pay the price of its production. The costs of production justifiably should include the costs of injuries received by workmen in production.

The Acts are administered by administrative boards, agencies or commissions, depending on the nomenclature chosen by the particular jurisdiction.

Everyone benefits from workmen's compensation. The injured workman knows he is not going to be without compensation to assist him to provide food, clothing and shelter for his family and himself during his period of difficulty. He knows that he is not receiving hand-outs nor charity. The employer can be assured the workman is being assisted to regain his position in the labour force and return to industry as soon as his health will permit. In the meantime the employer is aware that he is providing real assistance to the workman and his family by the contributions made by way of assessments upon his industry. Society knows that a measure of its moral responsibility to hold the disabled in the community is being met by a sane and sensible programme of financial assistance. No large sums of moneys are required from community coffers because

> a self-sustaining fund has collected the moneys indirectly from consumers by requiring industry to pay the cost before the price tag is placed upon the commodities eventually placed in the market."
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In 1910 the Government of Ontario appointed a Commission of Inquiry which investigated and prepared a report. The Commissioner, Sir William Meredith, Chief Justice of the Supreme Court of Ontario completed his study and tendered the draft of legislation in 1914. The Bill was passed by the Ontario Legislature and became law on January 1, 1915. Nova Scotia passed legislation in that year which became effective in 1917. In 1916 Manitoba and British Columbia enacted legislation followed by Alberta and New Brunswick (1918), Saskatchewan (1929), Quebec (1931), Prince Edward Island (1949) and finally Newfoundland (1951).

The Acts were all basically designed to establish a plan by which the injured workman is compensated for the injuries sustained in the course of his employment. The funds required for compensation payments, medical fees, rehabilitation, and administration were obtained by assessments on employers engaged in industries covered by the Act. The level of assessment is fixed upon the level of payroll of each employer and modified by the type of industry in which he is engaged. The higher risk industries ultimately were placed in a class and the degree of risk eventually resulted in higher assessments. The legislation which provides the benefits to the claimants at the same time barred any right of action which he formerly possessed against the employer.

The legislation was and is a compromise of sorts between two groups, i.e. employers and employees. In a 1952 Report by Chief Justice Sloan, he replied to demand for increased benefits by stating:

> As I pointed out in 1942, the adoption of a workmen's compensation scheme was done with the deliberate purpose of abandoning common-law duties, rights, obligations, and remedies. Other rights different in concept and exclusive in operation

were substituted. Both workman and employer had to forego common-law rights in a compromise for the common good. The primary right relinquished by labour was the chilly one of attempting to recover damages at common-law from an employer protected by a wall bristling with almost impregnable defences.

Under the Act an injured workman is entitled to compensation notwithstanding the fact that his employer is not in the slightest degree negligent, and in almost 100 per cent of injury cases the workman is now entitled to be paid compensation in contrast with the common-law recovery of damages in only 20 to 30 per cent of injury cases, and only then after a protracted and anxious bout with the law.

. . . Industry did not agree to bestow these benefits nor to disarm itself of the weapons of defence it was entitled to use at common-law without exacting some concessions from labour. Labour makes its major contributions by an original 45 per cent deduction of wage-loss now lowered to 33 1/3 per cent by a waiting period, and by foregoing any money claims based on pain and suffering . . . 2

Mr. Justice Tysoe elaborated on this by indicating

Notwithstanding any seeming defects in administration there is no shadow of a doubt that workmen have always been immeasurably better off under the Workmen's Compensation Act than they were prior to its enactment. The fact is that roughly, 75 per cent of those who are recipients of the extensive benefits provided by the Act would have received nothing at all in earlier times, and they make no financial contribution to the cost of these benefits.

It would not be right were I to omit to say that, in my opinion, employers are also better off than they would be were the Act not in force. They are relieved of the expenditure of time and money contesting workmen's claims against them in the Courts and of the ill feeling that is generated by hard-fought legal battles.

It is my feeling that the Act has benefited workmen and employers in about equal proportion.

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In assessing present legislation and formulating future approaches the various commissions and committees have endeavoured to reflect the realities of the synthesis between the two groups and many contrary arguments can arise, some of which may reflect the misunderstanding noted by Tysoe in the preliminary introduction to his report.

> Some individuals misconceive the purpose and intention of the Act and of the scheme or plan it embodies. It was not designed to be a social welfare measure. Nor, in my view, should it be. The time may come when it will be integrated with a broad system of social security, but it is my feeling that its purpose is so different to that of a social welfare scheme that it ought not to be completely swallowed up in such a scheme. I feel that it would be undesirable from the standpoint of accident prevention alone. The prime mission of those who administer workmen's compensation and the prime purpose of the Act is not to furnish financial benefits, but to promote and encourage measures for the prevention of injury to workmen in the course of their work and, should any be so unfortunate as to become disabled as a result of such injury, means for their rehabilitation and return to useful employment as soon as possible. To keep work-connected injuries to a minimum is the first object. Restoration of injured workmen physically and economically is the second, and to achieve it adequate medical care is to be provided. Payment of compensation while disabled is very necessary certainly, but it is only incidental to the main purpose of restoring workmen to the point where they can again play their proper part as citizens of our Province.
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The benefits conferred on workers are not the result of charity on behalf of employers since to again quote Mr. Justice Tysoe:

> These benefits are not granted as a matter of grace, but of right. There is no measure of charity about them. They have been acquired by the workmen as a body in return for giving up such common-law rights as they might have against employers. Indeed, it is not every workman who is entitled to the benefits of the compensation scheme, but only those workmen who are employed in the specified industries set out in the

Act. These workmen are in a special and separate class or category.

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The costs of the benefits paid under the Act and costs of administration which are reflected in the assessments are not permitted by the provisions of the Act to be levied in whole or in part against employees. However, in practice the employer has only so much of his resources to allocate to labour and the assessment may in the employers' minds become part of the wage compensation package. The suggestion is also advanced from time to time that the costs to industry is merely added to the cost of the product or service and so in the final analysis is borne by the consumer and taxpayer. This is only true to the extent that the employer can pass on his costs of production to the customer. In some monopoly or oligopoly situations where the employer does not face any realistic competition the consumer can be made to absorb the total cost. To the degree that the employer is in competition with non-assessed employers or industries outside the jurisdiction the costs of compensation become one of many factors in determining the overall competitiveness of the employer.

While it is dangerous to summarize a summary since if one is successful, the reader can justifiably ask why it was done in the longer form, the legislation can be viewed as a scheme whereby the rights of both parties are compromised with the worker giving up his full rights of recovery for partial benefits on a no-fault basis and a safer workplace and the employer paying an assessment spread throughout the industry as a whole and receiving immunity from common law actions.

When considering reforms, history suggests it may be worthwhile to consider whether the change promotes quick, efficient, non-adversarial payments to claimants with respect to their loss of earnings due to the compensable injury. Does the change promote safer working conditions and would it assist in the rehabilitation of workers?